From: (b) (6)
To: Ring, John
Subject: HR Policy Association Fall Labor and Employment Conference
Date: Monday, August 27, 2018 2:15:55 PM
Attachments: Chairman Ring Invitation.pdf

Good Afternoon,

Please find the attached invitation to speak at the Fall HR Policy Association Conference from (b) (b)

Thank you,

(b) (6)
(b) (6)
Office: (b) (6)
Fax: (614) 423-2991

HR POLICY ASSOCIATION
The Association of Chief Human Resource Officers

August 27, 2018

John Ring
Chairman
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Re: HR Policy Association Fall Labor and Employment Conference

Dear Mr. Ring:

I am writing on behalf of the HR Policy Association to determine whether you would be available to speak at our Fall Labor and Employment Conference on Wednesday, November 14, 2018. Our meeting will be held at the Jones Day offices in Washington, D.C. We would like you to cover recent developments from the National Labor Relations Board including the status of various initiatives that the Board has undertaken involving joint employer rulemaking, election rule review, employer obligations regarding access to their email systems, and independent contractor case law developments that would be of interest to our members. Our members are, as you are aware, generally the senior labor and employment representatives for their respective companies. We are just in the process of putting our agenda together and could be flexible as to the time of your remarks on the 14th. Ideally, we would like you to make remarks for approximately 35-40 minutes followed by an approximate 15-20 minute Q&A.

John, I hope that you can join us for our Fall Labor and Employment Conference. Please have a member of your staff contact me if you need additional information.

Sincerely,

(b) (6)
(b) (6)
(b) (6) @hrpolicy.org
(b) (6)

From:	Rothschild, Roxanne L.
To:	Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William; (b) (6)
Cc:	Lucy, Christine B.
Subject:	ABA Labor & Employment Law Conference Board session discussion
Date:	Tuesday, September 18, 2018 3:53:05 PM
Attachments:	Press Release - Board Proposes Rule to Change its Joint-Employer Standard.pdf Federal Register publication of NLRB Notice of Proposed Rulemaking regarding Joint-Employer Standard 9-14-2018.pdf Notice and Invitation to file briefs in Caesars Entertainment Corp.pdf Notice and Invitation to file briefs in Loshaw Thermal Technology.pdf Press Release - NLRB Launches Pilot of Proactive Alternative Dispute Resolution (ADR) Program.pdf ADR ALJD Issuance Insert Pilot Proactive Program.pdf Press Release - NLRB Administrative Law Judges Validly Appointed.pdf Press Release - NLRB to Undertake Comprehensive Internal Ethics and Recusal Review.pdf

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All:

Below is the list of topics discussed during this morning's call for the Board's session at the ABA's Labor & Employment Law Conference on November 8, 2018.

- Rulemaking regarding the Board's Joint-Employer Standard (comment period closes 11/13/2018)
- Requests for briefing in Caesar's and Loshaw
- Enhanced Board ADR Program
- Boeing & Murphy Oil cases – what the Board is doing to handle these cases
- Status of comments on the Election Rule Request for Information
- ALJ Appointments found to be valid

I have also attached documents that the Board may wish to provide to the ABA as documents to be distributed to conference attendees. The documents attached are:

- Press Release re: Board's proposal to change its Joint-Employer Standard
- Federal Register publication of Board's Notice of Proposed Rulemaking re: Joint-Employer Standard
- Notice and Invitation to File Briefs in Caesar's Entertainment Corp.
- Notice and Invitation to File Briefs in Loshaw Thermal Technology Corp.
- Press Release re: Enhanced ADR Program
- ADR promotional flyer that is sent out when ALJ Decisions issue
- Press Release re: ALJs validly appointed

I have also attached the Press Release regarding the comprehensive internal ethics and recusal review. I didn't know if you would want to talk about this or include this document.

I will schedule another call to include (b) (6) for sometime in October. I will also set up a

meeting with Lori Ketcham to take place shortly before the ABA conference to cover reminders regarding ethical obligations as to the speaking engagements.

Thanks,

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From: (b) (6)
To: Rothschild, Roxanne L.
Cc: Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William; Lucy, Christine B.
Subject: Re: ABA Labor & Employment Law Conference Board session discussion
Date: Tuesday, September 18, 2018 4:06:33 PM

Thank you, Roxanne. I appreciate your follow up email from today's conference call. I will review and share with (b) (6)

(b) (6)

Sent from my iPhone

> On Sep 18, 2018, at 3:53 PM, Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov> wrote:
>
> All:
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> National Labor Relations Board
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> <Press Release - Board Proposes Rule to Change its Joint-Employer Standard.pdf>
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From: Rothschild, Roxanne L.
To: Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Cc: (b) (6) @FaegreBD.com (b) (6) @levyratner.com
Subject: Fwd: Paper and Materials For ABA/Nov. NLRB Panel
Date: Monday, October 15, 2018 11:35:05 AM
Attachments: ABA 2018 NLRB Panel Paper.DOCX
ATT00001.htm
Press Release - Board Proposes Rule to Change its Joint-Employer Standard.pdf
ATT00002.htm
Federal Register publication of NLRB Notice of Proposed Rulemaking regarding Joint-Employer Standard 9-14-2018.pdf
ATT00003.htm
Notice and Invitation to file briefs in Caesars Entertainment Corp.pdf
ATT00004.htm
Press Release - NLRB to Undertake Comprehensive Internal Ethics and Recusal Review.pdf
ATT00005.htm
Press Release - NLRB Administrative Law Judges Validly Appointed.pdf
ATT00006.htm
ADR ALJD Issuance Insert Pilot Proactive Program.pdf
ATT00007.htm
Press Release - NLRB Launches Pilot of Proactive Alternative Dispute Resolution (ADR) Program.pdf
ATT00008.htm
Notice and Invitation to file briefs in Loshaw Thermal Technology.pdf
ATT00009.htm

FYI

Sent from my iPhone

Begin forwarded message:

From: (b) (6) @FaegreBD.com>
Date: October 8, 2018 at 12:53:09 PM EDT
To: (b) (6) @hmbr.com>, (b) (6) @americanbar.org" (b) (6) @americanbar.org>, (b) (6) @alaskaair.com>
Cc: "Rothschild, Roxanne L." <Roxanne.Rothschild@nlrb.gov>, (b) (6) (b) (6) @levyratner.com>
Subject: Paper and Materials For ABA/Nov. NLRB Panel

(b) (6)

Attached please find the paper (jointly authored by (b) (6) and me), along with the materials provided by the NLRB, that , in aggregate, will serve as the written materials for November's NLRB panel. Thanks for your help and feel free to cal (b) (6) or me with any questions or concerns.

Thanks,
(b) (6)

(b) (6)
Partner
(b) (6) @FaegreBD.com Download vCard
D: +(b) (6) | F: +1 317 237 1000
Faegre Baker Daniels LLP

300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

American Bar Association
12th Annual Section of Labor & Employment Law Conference
The NLRB Under the Trump Administration

Paper Prepared By

(b) (6)
(b) (6)
Faegre Baker Daniels LLP

(b) (6)
Levy Ratner, P.C.

The Joint-Employer Standard

On September 14, 2018, the National Labor Relations Board ("Board") published a Notice of Proposed Rulemaking regarding its joint-employer standard. The comment period closes on November 13, 2018.

Under the Board's proposed joint-employer regulations, two entities may be considered a joint employer of workers only if the two entities share or codetermine the workers' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. The proposed regulations provide that to be a joint-employer an entity must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of workers in a manner that is not limited or routine.

In *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), the Board reevaluated longstanding precedent to expand the joint employer doctrine. Browning-Ferris ("BFI") owned a recycling facility. The Union filed a petition for an election to represent the workers that processed the recycling materials inside the facility. The workers were not employed by BFI, but instead were supplied by another entity, Leadpoint Business Services ("Leadpoint"). The Board found that BFI was a joint-employer with Leadpoint because it shared or codetermined the workers' essential terms and conditions of employment. The Board held it "will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and in a limited and routine manner." Therefore, after *Browning-Ferris,* the Board could find a joint employer relationship where an entity only had reserved, but unexercised, authority to control some terms and conditions of employment of the at-issue workers or under circumstances when an entity only had indirect authority over workers' terms and conditions of employment.

In December 2017, the Board issued *Hy-Brand Industrial Contractors, Ltd*, 365 NLRB No. 156 (2017), and overruled *Browning-Ferris*. In *Hy-Brand*, the Board returned to the pre-*Browning-Ferris* standard of joint employment, which required direct and immediate control over essential employment terms of the workers at issue. However, just two months later, the Board vacated *Hy-Brand*.

The Board's proposed joint-employer rulemaking seeks to memorialize the pre-*Browning-Ferris* joint-employment standard in regulatory, rather than case-law, form. Yet in its proposed format, it may prove to be even more restrictive than the rule that existed prior to *Browning-Ferris*.

Employees' Statutory Right To Use Their Employers' Email Systems

On August 1, 2018, following an appeal from an Administrative Law Judge ("ALJ") decision in *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, the Board issued an invitation to file briefs to address the issue of whether it should adhere to, modify, or overrule *Purple Communications*. The Board will also consider whether to return to the standard adopted in *Register Guard*, which held that employers may lawfully impose § 7-neutral restrictions on employees' nonwork-related uses of their email systems. The briefing deadline closed on September 5, 2018.

Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino, 28-CA-060841, JD(SF)-20-16, issued on May 3, 2016. In *Caesars*, the employer maintained a rule in its employee handbook that stated, in relevant part, that computer resources may not be used to "…send chain letters or other forms of non-business information…" The ALJ, applying the standard adopted in *Purple Communications*, found this rule was overly broad because it effectively prohibited employees' use of the employer's email systems to engage in §7 communications during nonworking time. The ALJ ordered the employer to rescind the rule with respect to prohibiting employees use of email to distribute "non-business information."

Purple Communications, Inc., 361 NLRB 1050 (2014), overruled *Register Guard*, 351 NLRB 1110 (2007), *enfd in part and remanded sub nom. Guard Publishing v NLRB*, 571 F. 3d 53 (D.C. Cir. 2009), adopted a presumption that employees who have been given access to their employers' email systems for work-related purposes are entitled to use the system to engage in protected § 7 discussions while on nonworking time. An employer may rebut that presumption by demonstrating that its restrictions to the email use are justified by special circumstances necessary to maintain production or discipline.

Establishing § 9(a) Bargaining Relationships By Contract Language Alone

On September 11, 2018, following the appeal of an ALJ decision in *Loshaw Thermal Technology, LLC*, the Board issued an invitation to file briefs to address the issue of whether it should adhere to, modify, or overrule *Re Staunton Fuel & Material, Inc*., 335 NLRB 717 (2001) and *Casale Industries*, 311 NLRB 951 (1993). The period to file briefs with the Board closed October 26, 2018.

Staunton Fuel held that a § 9(a) relationship can be established where contract language unequivocally indicates that: (1) the Union requested recognition as the majority or § 9(a) representative of the unit employees; (2) the employer recognized the Union as the majority or § 9(a) representative; and (3) the employer's recognition was based on the Union's having shown, or having offered to show, evidence of its majority support. *Casale Indus*. held that the when an employer extends § 9(a) recognition to a Union in the construction industry, the Board will not entertain a claim that majority status was lacking at the time of recognition when more than six (6) months have elapsed without a charge or petition.

Loshaw Thermal Technology, LLC, 05-CA-152650, (JD-64-16) issued on July 7, 2016. In *Loshaw*, the employer and the Union entered into a collective bargaining agreement that included language that stated that the Union had "requested recognition as a § 9(a) representative of the employees covered by this agreement and having offered to demonstrate or having demonstrated through authorization cards that it has the support of the majority of the employees to serve as such representative, the employer hereby recognizes the union as the § 9(a) representative of the employees." The employer withdrew recognition four years later claiming that the Union did not have majority support from the employees. The ALJ, applying *Staunton Fuel*, found that a § 9(a) relationship had been established at the time that the employer entered into the agreement with the union. Then, applying *Casale Indus.*, the ALJ held that the employer could not challenge the recognition language in the contract because more than six (6) months had elapsed.

Employers' Maintenances of Policies, Rules, and Employee Handbooks After *Boeing*

In *The Boeing Co.*, 365 NLRB No. 154 (2017), the Board in a 3-2 decision modified its standard when evaluating a facially neutral policy, rule, or handbook provision. At issue in *Boeing* was the Company's policy restricting the use of camera-enabled devices, such as cell phones, on its property. The policy did not explicitly restrict § 7 activities and was not adopted in response to NLRA-protected activity. Nevertheless, the ALJ found the maintenance of the rule unlawful -- applying the test set forth in *Lutheran Heritage*, 343 NLRB 646 (2004).

In *Lutheran Heritage*, the Board stated that if a rule is not unlawful on its face, it will still find a violation if: 1) employees could "reasonably construe" the language to prohibit § 7 activity; 2) the rule was promulgated in response to union activity; or 3) the rule has been applied to restrict the exercise of § 7 rights. In *Boeing*, the ALJ found that employees would reasonably construe the "no-camera rule" to prohibit § 7 activity. The ALJ did not take into consideration Boeing's security needs for the rule.

The Board in *Boeing* overruled the *Lutheran Heritage* "reasonably construe" standard. Now, post-*Boeing*, when evaluating a facially neutral rule, the Board will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights, and (2) the employer's legitimate justifications associated with the rule. The Board announced it would evaluate employment policies, rules, and handbook provisions as falling into one of three categories. Category 1 encompasses rules the Board will designate as lawful because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights, or the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Category 2 consists of rules that will warrant individualized scrutiny as to whether the rule would prohibit or interfere with NLRA rights and whether the rule's adverse impact outweighs the employer's legitimate business to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. Category 3 rules are rules that the Board will always find to be unlawful. After considering the Company's business justifications, the Board decided that Boeing's no-camera rule was a Category 1, and thus lawful.

Lawfulness of Arbitration Agreements Containing Class-Action Waivers

On May 21, 2018, the Supreme Court of the United States issued its decision in *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300; and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (May 21, 2018). The Court held that arbitration agreements entered into between employers and employees providing for arbitration to resolve employment disputes are enforceable, and are not rendered unlawful under either the Federal Arbitrations Act ("FAA") or the NLRA. The Court found that the FAA provides for enforcement of arbitration agreements according to their terms, including terms providing for individualized proceedings. Although the NLRA secures employees' right to organize and bargain collectively, the Court held that the NLRA does not include a right to class or collective actions.

NLRB ALJ Appointments After *Lucia v SEC*

On June 21, 2018, the Supreme Court of the United States issued its decision in *Lucia v. Securities and Exchange Commission*, No. 17-130 (June 21, 2018), finding that Securities and Exchange Commission ("SEC") ALJs are "Officers of the United States" subject to the Appointments Clause of the United States Constitution. The Court further held that the SEC ALJ that heard and decided the underlying case was not appointed consistent with Appointments Clause. As a result, the Court remanded the case so that a new hearing be conducted before a properly constitutionally appointed SEC ALJ. The Appointments Clause requires that "inferior officers" of the United States must be appointed by the President, "Courts of Law," or "Heads of Departments." The Court found that SEC ALJs were selected by SEC staff members and not by any of the Constitutionally required appointing bodies.

Board Proposes Rule to Change its Joint-Employer Standard

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

September 13, 2018

WASHINGTON, DC — The National Labor Relations Board will publish a Notice of Proposed Rulemaking tomorrow in the Federal Register regarding its joint-employer standard. Under the proposed rule, an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship.

As explained in the Notice, rulemaking in this important area of the law would foster predictability, consistency and stability in the determination of joint-employer status. The proposed rule reflects the Board majority's initial view, subject to potential revision in response to public comments, that the National Labor Relations Act's intent is best supported by a joint-employer doctrine that does not draw third parties, who have not played an active role in deciding wages, benefits, or other essential terms and conditions of employment, into a collective-bargaining relationship for another employer's employees.

In announcing the proposed rule, Board Chairman John F. Ring stated, "I look forward to receiving the public's comments and to working with my colleagues to promulgate a final rule that clarifies the joint-employer standard in a way that promotes meaningful collective bargaining and advances the purposes of the Act."

Chairman Ring was joined by Board Members Marvin E. Kaplan, and William J. Emanuel in proposing the new joint-employer standard. Board Member Lauren McFerran dissented.

Public comments are invited on all aspects of the proposed rule and should be submitted within 60 days of the Notice's publication in the Federal Register, either electronically to www.regulations.gov, or by mail or hand-delivery to Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570.

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private-sector employers and unions.

Any person wishing to comment on any ongoing rulemaking by the National Labor Relations Board must do so in accordance with the applicable Notice of Proposed Rulemaking. Communications submitted in any other manner, including comments on this website, will not be considered by the Board.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION
d/b/a RIO ALL-SUITES HOTEL AND CASINO

and Case 28-CA-060841

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL 15,
LOCAL 159, AFL-CIO

NOTICE AND INVITATION TO FILE BRIEFS

On May 3, 2016, Administrative Law Judge Mara-Louise Anzalone issued a decision in the above-captioned case, applying *Purple Communications, Inc.*, 361 NLRB 1050 (2014), to find that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining a policy prohibiting the use of its computer resources to send non-business information. Under *Purple Communications*, employees who have been given access to their employer's email system for work-related purposes have a presumptive right to use that system for Section 7–protected communications on nonworking time, unless the employer can demonstrate that special circumstances necessary to maintain production or discipline justify restricting that presumptive right. Id. at 1063. Excepting, the Respondent asks the Board to overrule *Purple Communications* and, implicitly, to return to the holding of *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), that employees do not have a statutory right to use their employers' email system for Section 7 activity. Under the *Register Guard* standard, employers may lawfully impose Section 7–neutral restrictions on employees' nonwork-related uses of their email systems, even if those restrictions have the effect of limiting the use of those systems for communications regarding union or other protected concerted activity.

To aid in consideration of this issue, the Board now invites the filing of briefs in order to afford the parties and interested *amici* the opportunity to address the following questions.

1. Should the Board adhere to, modify, or overrule *Purple Communications*?

2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?

3. If the Board were to return to the holding of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so,

should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?

4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

In responding to these questions, the parties and *amici* are invited to submit empirical evidence, including anecdotes or descriptions of experiences that the Board may find useful in deciding whether to adhere to *Purple Communications* or adopt another standard.[1]

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[1] We note the similarity between our dissenting colleagues' arguments and those made by the dissenters to the grant of review and invitation to file briefs in *Lamons Gasket Co.*, 355 NLRB 763 (2010). The majority there sua sponte sought reconsideration of Board precedent set just 3 years earlier in *Dana Corp.*, 351 NLRB 434 (2007). In a concurring opinion, former Chairman Liebman rebuked the dissent's arguments that reconsideration was unnecessary and unprecedented, observing:

> The dissent's view of the proper role and function of a Federal administrative agency like the National Labor Relations Board is unusual, particularly coming from within such an agency. Compare, for example, the Supreme Court's quite recent observation:
>
> > "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis," . . . for example, in response to changed factual circumstances, *or a change in administrations*.
>
> *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–864 (1984).

355 NLRB at 763 (emphasis added).

As for our decision to invite public briefing here on whether to overrule precedent, we adhere to the view that doing so is a matter of discretionary choice on a case-by-case basis and is not mandated by the Act, any Board rule or past practice, or by the Administrative Procedure Act. As our colleague acknowledges, her contrary view reiterates the dissenting position rejected by the majority in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).

Finally, we join dissenting Member McFerran's pledge to keep an open mind with respect to final disposition of the issues presented here. However, we do not accept her premise that the Board must adhere to a policy choice made in a prior decision unless presented with actual evidence of "significant problems and intractable challenges" created by that decision. See generally *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (holding that an agency "need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before September 5, 2018. The parties may file responsive briefs on or before September 20, 2018, which shall not exceed 15 pages in length. No other responsive briefs will be accepted. The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/28-CA-060841 under the heading "Service Documents." If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Deputy Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C., August 1, 2018

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

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reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates").

MEMBER PEARCE, dissenting.

I dissent from the majority's decision to re-visit *Purple Communications, Inc*.[1] While I support public input when the Board considers significant changes in precedent, I do not support giving a golfer a mulligan simply because he or she wants to swing another club. Four years ago, I carefully considered and decided *Purple Communications*, after an extensive exchange of views with my colleagues and a thorough review of briefing by the public and the parties. In *Purple*, the majority responded to the massive change in workplace technology and communication where email has become "the most pervasive form of communication in the business world" and a "natural gathering place" extensively used by employees to communicate among themselves. 361 NLRB at 1055, 1057.

Nothing has changed since the issuance of *Purple* to warrant a re-examination of this precedent. As Member McFerran points out in her dissent, there have been no intervening adverse judicial decisions, *Purple* itself is currently pending before the Ninth Circuit Court of Appeals, and the Respondent has not identified any change in workplace trends or presented any empirical evidence suggesting that *Purple Communications* "will create significant and intractable challenges for employees, unions, employers and the NLRB", as posited in Member Miscimarra's dissent in *Purple*. The Respondent does not even bring new arguments for consideration. The only thing new is the Board's composition.[2]

On another point, the charging party in this case has suffered the consequences of several dramatic shifts in Board law merely because the majority is intent on creating vehicles for prematurely reversing precedent. Lest we forget, in *The Boeing Company*, 365 NLRB No. 154 (2017), the majority went out of its way to reverse sua sponte the Board's decision in this case -- despite the fact that the charging party was not a party in *Boeing* and this case was pending before the Ninth Circuit Court of Appeals. After *Boeing* issued, the court remanded this case to the Board. And then when the charging party sought to protect its rights by moving to intervene in *Boeing* in order to seek reconsideration of that decision -- the decision that stripped its victory away -- the majority denied charging party's request to intervene. Now, this majority, in its zeal to revisit *Purple Communications,* has once again used this charging party as a punching bag.

Dated, Washington, D.C., August 1, 2018

MARK GASTON PEARCE, MEMBER

[1] 361 NLRB 1050 (2014)

[2] The majority's claim that it is doing nothing more than what the Board majority did in *Lamons Gasket Co.* is disingenuous. In *Lamons Gasket*, 357 NLRB 739 (2011), the Board reversed *Dana Corp.* – a case that reversed 41 years of precedent, based on a dubious view about voluntary recognition that was contradicted by empirical evidence. 351 NLRB 434 (2007).

Member McFerran, dissenting.

Less than 4 years ago, in *Purple Communications*, *Inc.*, the Board held that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email," unless the employer can demonstrate that special circumstances necessary to maintain production or discipline justify restricting that presumptive right." 361 NLRB 1050, 1063 (2014). The Board reached that conclusion after inviting and receiving briefs from amici,[1] and after thoroughly considering the views presented both in those briefs and by the dissenting Board members.

Now, the Respondent in this case has asked the Board to overrule *Purple Communications*. However, the Respondent has not presented any new arguments, not already considered by the previous Board, to suggest that *Purple Communications* was incorrectly decided – indeed, the Respondent largely recycles the arguments made by then-Members Miscimarra and Johnson in their dissents. The Respondent has not identified any adverse judicial decisions that might warrant revisiting the decision.[2] Similarly, Respondent has not presented any empirical evidence, or even good reason to suspect, that *Purple Communications* has proved problematic in practice, as predicted by critics of its holding.[3] Nor has the Respondent identified any recent workplace changes or new trends that would justify reconsideration of *Purple Communications*.

In those circumstances, the majority's decision to revisit *Purple Communications* is premature, at best. Although the Board appropriately may revisit precedent when a compelling reason exists, the majority's decision to issue the present notice – which essentially gives an open invitation to interested parties to attempt to *generate* such a compelling reason -- gets

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[1] *Purple Communications, Inc.*, Case No. 21-CA-095151 et al., Notice and Invitation to File Briefs (filed April 30, 2014), available at http://apps.nlrb.gov/link/document.aspx/09031d45816e13ce.
Amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations, Service Employees International Union, labor law professor Jeffrey M. Hirsch, the United States Chamber of Commerce, the Council on Labor Law Equality, a group of entities consisting of the Coalition for a Democratic Workplace and nine other amici, the Employers Association of New Jersey, the Equal Employment Advisory Council, the American Hospital Association, the Retail Litigation Center, the National Grocers Association, the Food Marketing Institute, the United States Postal Service, the Arkansas State Chamber of Commerce, and the National Right to Work Legal Defense Foundation. *Purple Communications,* 361 NLRB at 1051 fn. 9.

[2] In fact, *Purple Communications* itself has not even received full judicial consideration; the employer's petition for review of the Board's decision (following a remand to the administrative law judge) remains pending in the United States Court of Appeals for the Ninth Circuit. *Communication Workers of America v. NLRB*, No. 17-70948 (9th Cir.), petition for review of order reported at 365 NLRB No. 50 (2017).

[3] In dissent, then-Member Miscimarra, for example, warned that the "new right [articulated by *Purple Communications*], will create significant problems and intractable challenges for employees, unions, employers, and the NLRB." *Purple Communications*, 361 NLRB at 1086.

things backward.[4] The better course would be to decline the Respondent's request, and all similar requests, until such time as the Board is presented with a genuine compelling reason to reopen the debate resolved in *Purple Communications*.[5]

In short, I do not support the majority's decision to revisit *Purple Communications* while the decision remains pending in the Courts of Appeals and in the absence of adverse judicial decisions and any evidence of changes in the workplace or problems caused by the Board's approach. But given that a majority of the Board is clearly determined to proceed, I support the majority's decision to return to the Board's practice of seeking public participation before reconsidering significant precedent. That practice had been in place and largely adhered to since the 1950's until it was abruptly abandoned late last year.[6] *If* the Board is going to reconsider an important precedent, then it is obviously better to seek public participation when doing so, and I will consider with an open mind whatever evidence and public input might emerge from this

---

[4] Notably, the majority's notice exceeds the scope of the Respondent's request to overturn *Purple Communications*. In addition to asking whether the standard should revert to *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), or some alternative standard, the majority asks whether any exceptions should be made for scattered workforces, facilities located in areas that lack broadband access, or other special circumstances. Moreover, the notice suggests that the majority seeks to go beyond deciding the present case, which concerns only email, to make policy that reaches other forms of electronic communication. This approach resembles not adjudication, but rulemaking – albeit rulemaking without following the process required by the Administrative Procedure Act. As public statements from the Chairman have disclosed, the Board is now contemplating rulemaking with respect to the joint-employer standard under the National Labor Relations Act. In exercising its discretion to choose between adjudication and rulemaking, the Board surely must explain its choice – here, too.

[5] Certainly, the mere change in the composition of the Board since *Purple Communications* was decided is not a reason to revisit the decision. See *Brown & Root Power & Mfg., Inc.*, 2014 WL 4302554 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), citing *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954). Relatedly, the majority remarks that there is a perceived inconsistency between my views on the appropriate circumstances in which to solicit public input about the reconsideration of precedent and the views of a previous Board Member (Chairman Liebman) in a personal concurring statement in case I did not participate in, and which issued more than four years prior to the start of my service on this Board. I express no views on the Board's prior determination to seek briefing in *Lamons Gasket*, other than to note that there appears to have been empirical evidence under discussion in that case that directly spoke to the practical impact of the decision that was subject to reconsideration. Regardless, I am entirely comfortable with any perceived tension between my views expressed here and those expressed by Chairman Liebman in that case, because the question of what factors the Board should take under consideration in determining whether to revisit precedent is a difficult institutional issue that each Board Member must approach with his or her own independent judgment.

[6] See *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 fn. 2 (2017) (and the cases cited therein).

process suggesting that *Purple Communications* should be revisited. I trust that my colleagues will similarly give full consideration to whatever reliable, empirical information the Board may receive – and that they will be fully open to adhering to current law should actual evidence of "significant problems and intractable challenges" (in then-Member Miscimarra's phrase) fail to materialize.

Dated, Washington, D.C., August 1, 2018

LAUREN McFERRAN, MEMBER

NLRB to Undertake Comprehensive Internal Ethics and Recusal Review

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

June 8, 2018

Washington, DC — The National Labor Relations Board today announced that it will undertake a comprehensive review of its policies and procedures governing ethics and recusal requirements for Board Members. This initiative will ensure that the NLRB's stakeholders—and the American people generally—can have full confidence in the integrity of the Board and its recusal processes.

"Recent events have raised questions about when Board Members are to be recused from particular cases and the appropriate process for securing such recusals," said NLRB Chairman John F. Ring. "We are going to look at how recusal determinations are made to ensure not only that we uphold the Board's strong ethical culture, but also to ensure each Board Member's right to participate in cases is protected in the future. Those who rely on us to decide labor matters need to know their cases will be decided under proper procedures that ensure an appropriate Board majority."

Chairman Ring has proposed for Board consideration a review, to be conducted expeditiously, that would examine every aspect of the Board's current recusal practices in light of the statutory, regulatory, and presidential requirements governing those practices. Among other things, the Board would review and evaluate all existing procedures for determining when recusals are required, as well as the roles and responsibilities of Agency personnel in connection with making such determinations. To more fully inform its review, the Board would seek outside guidance, including gathering information regarding the recusal practices of other independent agencies with adjudicatory functions. Under the Chairman's proposal, the review would culminate with the issuance of a report that sets forth the Board's findings and establishes clear procedures to ensure compliance with all ethical and recusal obligations.

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employers and employees from unfair labor practices, and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

NLRB Administrative Law Judges Validly Appointed

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

August 6, 2018

Washington, D.C.—The National Labor Relations Board today rejected a challenge regarding the appointment of its administrative law judges ("ALJs"), concluding that all of the Board's ALJs have been validly appointed under the Appointments Clause of the United States Constitution.

On June 21, 2018, the Supreme Court issued its decision in *Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044 (2018), finding that administrative law judges of the Securities and Exchange Commission ("SEC") are inferior officers of the United States and thus must be appointed in accordance with the Appointments Clause, i.e., by the President, the courts, or the Head of Department. Id. at 2051. Unlike the SEC's ALJs, the NLRB's ALJs are appointed by the full Board as the "Head of Department" and not by other Agency staff members.

The challenge was raised by WestRock Services, Inc. ("WestRock") in Case 10-CA-195617 on a motion to dismiss. Chairman John F. Ring was joined by Members Mark Gaston Pearce, Lauren McFerran, Marvin E. Kaplan and William J. Emanuel in the order denying WestRock's motion.

NLRB ADR PROGRAM

NLRB OFFERS NO-COST MEDIATION PROGRAM FOR UNFAIR LABOR PRACTICE CASES PENDING BEFORE THE BOARD

In order to encourage speedy resolution of unfair labor practice cases pending before the Board, the NLRB ADR program provides mediation services at no cost to the parties. The Board provides a mediator to facilitate confidential settlement discussions and explore resolution options that serve the parties' interests. The program is voluntary, and the mediator has no authority to impose a settlement.

Cases can enter the ADR program whenever a case is pending before the Board.

- Any time after an Administrative Law Judge (ALJ) decision issues, parties may contact the Office of the Executive Secretary to ask, confidentially, to be included in the ADR program.
- After exceptions are filed to an ALJ decision, the Office of the Executive Secretary will identify cases pending before the Board that appear amenable to resolution through the ADR program, and may require the parties in such cases to participate in a conference call to discuss placement of their case in the program.

The NLRB ADR program provides the parties savings in time and money, greater control over the outcome of their cases, and more creative, flexible, customized, and all-encompassing resolutions.

Features of the Board's ADR program include:

- The identity of a party making a request to enter the ADR program will remain confidential unless the party agrees otherwise.
- A party who enters the program may withdraw from the program at any time.
- The Board will stay further processing of the unfair labor practice case for a reasonable period or until the parties reach a settlement, whichever occurs first.
- The preferred method of conducting settlement conferences is to have the parties and/or their representatives attend in person. Settlement conferences may be held by telephone or videoconference if necessary.
- Parties may be represented by counsel at the settlement conferences, but representation by counsel is not required. Each party must have in attendance, however, a representative who has the authority to make offers and bind the party to the terms of a settlement agreement.
- Discussions between the mediator and the participants will be confidential, and there will be no communication between the program and the Board on specific cases submitted to the ADR program, except for procedural information such as case name, number, and status.
- Nothing in the ADR program is intended to discourage or interfere with settlement negotiations that the parties wish to conduct independently outside the program.
- Settlements reached are subject to approval in accordance with the Board's existing procedures for approving settlement agreements.

More information about the NLRB's ADR Program can be found in §102.45(c) of the NLRB's Rules and Regulations. If you would like to participate in the program, or if you have any questions about the program, please contact the Office of the Executive Secretary at (202) 273-1940 or send an email to Roxanne Rothschild, Deputy Executive Secretary at roxanne.rothschild@nlrb.gov.

NLRB Launches Pilot of Proactive Alternative Dispute Resolution Program

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

July 10, 2018

WASHINGTON, DC — Today, the National Labor Relations Board (NLRB) announced it is launching a new pilot program to enhance the use of its Alternative Dispute Resolution (ADR) program. The new pilot program will increase participation opportunities for parties in the ADR program and help to facilitate mutually-satisfactory settlements.

Under the new pilot program, the Board's Office of the Executive Secretary will proactively engage parties with cases pending before the Board to determine whether their cases are appropriate for inclusion in the ADR program. Parties may also contact the Office of the Executive Secretary and request that their case be placed in the ADR program. There are no charged fees or expenses for using the program.

Allowing parties greater control over the outcome of their cases, the NLRB's ADR program can provide parties with more creative, flexible, and customized settlements of their disputes. In addition to savings in time and money, parties who use the ADR program can broaden their resolution options, making the program particularly useful for cases where traditional settlement negotiations have been unsuccessful.

Participation in the ADR program is voluntary, and a party who enters into settlement discussions under the program may withdraw from participation at any time. A full description of the Board's ADR program can be found on the Agency's public website. If you have any questions regarding the program you may contact the Office of the Executive Secretary at (202) 273-1940.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOSHAW THERMAL TECHNOLOGY, LLC

and Case 05-CA-158650

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL UNION NO. 23

NOTICE AND INVITATION TO FILE BRIEFS

On July 7, 2016, Administrative Law Judge Eric M. Fine issued a decision in the above-captioned case, applying *Staunton Fuel & Material*, 335 NLRB 717 (2001), to find that language in the parties' collective-bargaining agreement established a bargaining relationship under Section 9(a) of the National Labor Relations Act, and applying *Casale Industries*, 311 NLRB 951 (1993), to find that the Respondent's challenge to the Union's Section 9(a) status was time-barred.

The Respondent is an employer in the construction industry, and the Board presumes that bargaining relationships in the construction industry are established under Section 8(f) of the Act.[1] Under *Staunton Fuel*, above, however, that presumption is overcome, and a 9(a) relationship is established, where language in the parties' collective-bargaining agreement unequivocally indicates that the union requested and was granted recognition as the majority or 9(a) representative of the unit employees, based on the union having shown, or having offered to show, evidence of its majority support. Id. at 719–720. And in *Casale Industries*, above, the Board held that it would "not entertain a claim that majority status was lacking at the time of recognition" where "a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition." Id. at 953. This 6-month limitations period applies regardless of whether the 9(a) recognition is itself alleged as an unfair labor practice or whether, as in this case, the invalidity of the recognition is advanced as a defense against a refusal-to-bargain charge.[2]

Excepting to the administrative law judge's decision, the Respondent asks the Board to overrule *Staunton Fuel* and require a "contemporaneous showing of majority support" to establish a 9(a) bargaining relationship in the construction industry. The Respondent also urges the Board to revisit *Casale Industries*' 6-month limitation on challenges to 9(a) status in the construction industry.

[1] *John Deklewa & Sons*, 282 NLRB 1375, 1385 fn. 41 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).
[2] See *Triple A Fire Protection,* 312 NLRB 1088, 1089 (1993), supplemented 315 NLRB 409 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999).

In a recent decision, the United States Court of Appeals for the District of Columbia Circuit rejected the holding of *Staunton Fuel* that contract language alone may create a 9(a) bargaining relationship in the construction industry. *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018); see also *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). Other federal courts of appeals, however, have held to the contrary. See *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000); *Sheet Metal Workers Local 19 v. Herre Bros., Inc.*, 201 F.3d 231 (3d Cir. 1999). In addition, the District of Columbia Circuit has expressed doubt regarding the holding of *Casale Industries*, see *Nova Plumbing*, 330 F.3d at 538–539, while other courts have upheld the Board's position, see *Triple C Maintenance*, 219 F.3d at 1156–1159; *NLRB v. Triple A Fire Protection,* 136 F.3d 727, 736–737 (11th Cir. 1998).

To aid in the consideration of the issues presented by the Respondent's exceptions, the Board now invites the filing of briefs in order to afford the parties and interested *amici* the opportunity to address the following questions.

1. Should the Board adhere to, modify, or overrule *Staunton Fuel*?

2. If the Board were to overrule *Staunton Fuel*, what standard should the Board adopt in its stead? Specifically, what should constitute sufficient evidence to overcome the presumption of a Section 8(f) relationship in the construction industry and establish a Section 9(a) relationship? Even if not dispositive, should contract language be deemed relevant to that determination? Where a union in the construction industry asserts (and the employer disputes) that a 9(a) bargaining relationship has been in existence for a period of time, should the Board's standard for determining whether the grant of 9(a) recognition validly reflects the wishes of a majority of employees in the bargaining unit be the same as for finding an initial establishment of a 9(a) relationship? If not, how should the standards differ?

3. Even if the Board modifies or overrules *Staunton Fuel*, under *Casale Industries* contract language alone would continue to be sufficient to establish 9(a) status whenever that status goes unchallenged for 6 months after 9(a) recognition is granted. If *Staunton Fuel* is modified or overruled, should the Board adhere to, modify, or overrule *Casale Industries*, and, if either of the latter, how?

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before Friday, October 26, 2018. The parties may file responsive briefs on or before 15 days after the initial briefs are due, which shall not exceed 15 pages in length.[3] No other responsive briefs will be accepted. The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/05-CA-158650 under the heading "Service Documents." If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Deputy Executive Secretary Roxanne Rothschild at 202-273-2917.

[3] If this due date falls on a weekend or holiday, the due date will be the next business day.

Dated, Washington, D.C., September 11, 2018.

JOHN F. RING,	CHAIRMAN
LAUREN McFERRAN,	MEMBER
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

From: (b) (6)
To: Rothschild, Roxanne L.; (b) (6) @levyratner.com)
Cc: Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Subject: RE: ABA Conference - Board panel session
Date: Thursday, October 25, 2018 1:59:58 PM

Thanks, Roxanne. (b) (6) and I will put our heads together to come up with softball questions to introduce the topics. We will share them with everyone well in advance of San Francisco for review/comment. Meeting before our presentation sounds great.

Have a great day and thanks again.

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Faegre Baker Daniels LLP
300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

From: Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov>
Sent: Thursday, October 25, 2018 11:58 AM
To: (b) (6) @levyratner.com) (b) (6) @levyratner.com>; (b) (6) (b) (6) @FaegreBD.com>
Cc: Ring, John <John.Ring@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>
Subject: ABA Conference - Board panel session

(b) (6):

FYI – the Chairman and the Board Members have divvied up the topics that were discussed for the ABA conference. We will be meeting with our Agency Ethics Officer next week to go over the topics as well as speaking engagement "do's & don'ts" for the conference. The Chairman thought it made sense to just have a quick meeting in San Francisco with both of you prior to the panel presentation to let you know who would be covering which topics during the session. They also plan to prioritize the order of the topics listed below in case time does not allow for all of the topics to be covered. Just so you know, they have asked me to speak on the subject of the Board's enhanced ADR pilot program because that program is run by my office. I'm not sure where the ADR program will end up in the list of priorities.

Please let me know if this works for you.

At this point, the topic assignments are as follows. Please note that this list does not yet represent the priority order.

1. Joint Employer Rulemaking - Chairman Ring
2. *Caesars/Rio All-Suites* Notice & Invitation to File Briefs to address the standard set forth in *Purple Communications* re: employees' nonwork-related use of employer email systems - Member Kaplan
3. *Loshaw* Notice & Invitation to File Briefs to address 8(f)/9(a) collective bargaining relationships in the construction industry (plus possibly the pending motion to dismiss the charge) - Chairman Ring
4. Boeing – Member Kaplan
5. Murphy Oil - Member Emanuel
6. ALJ Appointments (Board's decision in *WestRock Services*, 10-CA-195617 finding that the NLRB ALJ's are validly appointed) – Member McFerran
7. Internal Ethics and Recusal Review - Chairman Ring first, then Member Emanuel
8. Board's ADR program – Roxanne Rothschild
9. Election rules RFI/rulemaking status - Member Emanuel

Thank you,

Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From: Rothschild, Roxanne L.
To: (b) (6) @levyratner.com) (b) (6) Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Cc: Ketcham, Lori; Platt, Nancy; Goldstein, Dawn; Lucy, Christine B.
Subject: RE: ABA Conference - Board panel session
Date: Wednesday, October 31, 2018 2:50:19 PM

All:

Below is the list of topics to be covered by the Board at the upcoming ABA Conference, in the order that they will be covered. The topic order takes into account the fact that the session will be 1:15 in length, and it is possible that there may not be sufficient time to cover all of the topics.

1. Joint Employer Rulemaking - Chairman Ring
2. Election rules Request for Information/rulemaking status - Member Emanuel
3. *Caesars/Rio All-Suites* Notice & Invitation to File Briefs to address the standard set forth in *Purple Communications* re: employees' nonwork-related use of employer email systems - Member Kaplan
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8. Internal Ethics and Recusal Review - Chairman Ring first, then Member Emanuel
9. Board's ADR program – Roxanne Rothschild

We also may have a short "disclaimer" statement to be read at the beginning of the session regarding the joint-employer rulemaking topic. It would be something along the lines of "Please be advised that notes will be made as to comments made today regarding the Board's joint-employer rulemaking effort. The best way for comments to be captured for consideration, however, is through submission of comments at regulations.gov."

Thank you,

Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From: Rothschild, Roxanne L.

Sent: Thursday, October 25, 2018 11:58 AM
To: (b) (6) @levyratner.com (b) (6) levyratner.com>; (b) (6) (b) (6) @FaegreBD.com>
Cc: Ring, John <John.Ring@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>
Subject: ABA Conference - Board panel session

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Thank you,

Roxanne Rothschild
Acting Executive Secretary
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From:	(b) (6) .
To:	Rothschild, Roxanne L.; (b) (6) @levyratner.com)"
Cc:	Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Subject:	RE: ABA Conference - Board panel session
Date:	Monday, November 5, 2018 9:29:17 AM
Attachments:	ABA Draft NLRB Panel Questions.docx

Everyone,

Good morning! In advance of this week's ABA talk, attached please find a **draft** of our talking points for the panel. Please let us know your questions/comments/concerns so we can tailor the discussion to the Board's preferences.

Thanks!
(b) (6)

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From: (b) (6)
Sent: Thursday, October 25, 2018 2:00 PM
To: Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov>; (b) (6)
(b) (6) @levyratner.com) (b) (6) @levyratner.com>
Cc: Ring, John <John.Ring@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>
Subject: RE: ABA Conference - Board panel session

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Have a great day and thanks again.

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SAN FRANCISCO
ABA NLRB PANEL
MODERATOR QUESTIONS

Topic: Joint Employer Rulemaking

Panelist: Chairman Ring

Intro Question: *Chairman Ring, let's first talk about the always complex issue of joint employment. Since Browning-Ferris, the Board's joint employment standard has received a lot of attention – both in the legal community and in the popular discourse. In September, the Board proposed rulemaking related to the joint-employer standard.*

1. *What can you tell us about the status of the rulemaking?*
2. *Why has the Board decided to address this topic via rulemaking rather than just waiting for another case where joint employment is at issue?*
3. *Are there any other issues on the horizon that you think the Board might want to address via rulemaking?*

Topic: Election Rules Rulemaking

Panelist: Member Emmanuel

Intro Question: *One of the most significant initiatives the Board took during the Obama Administration was re-vamping its R case election process. There is now talk that the Board might revisit this issue.*

1. *What can you tell us about the Board's current thinking as to whether it wants again to engage in rulemaking related to is R case procedures?*
   What is driving the Board's thinking in this regard?

Topic: Employees' Use of the Employers' E-Mail Systems

Panelist: Member Kaplan

Intro Question: *Member Kaplan, another hot button issue for employees, labor, and management, is whether employees have a statutory right to use their employers' email systems during non-work time. Pending before the Board is the case Casers Entertainment Corp. d/b/a Rio All-Suites – in which this principle is at the forefront. The Board has invited briefs in this case.*

1. *What can you tell us about this case?*
2. *Do you anticipate that the Board will be soliciting amici briefs more often in the coming years? Why?*

Topic: 9(a) vs. 8(f)

Panelist: Chairman Ring

Intro Question: *Chairman Ring, it goes without saying that there are substantial differences in labor law if an employer is in the construction industry vs. if it is a non-construction industry employer. One of the biggest differences is the concept of 8(f) agreements that permit the parties to "walk away" from their bargaining relationship upon contract expiration. As a practitioner, one of the many curious aspects of the law is the long-standing holding that by mere language along an 8(f) construction agreement can be converted to a 9(a) agreement – even if none of the prerequisites to establishing a 9(a) relationship actually occurred. Recently, the Board has solicited briefs on this issue along with the related issue of whether the Board will entertain a claim that majority status was lacking at the time of 9(a) recognition when more than six (6) months have elapsed without a charge or petition.*

1. *What can you tell us about this case?*
2. *Do you envision the Board revisiting in other cases the issue of when the 10(b) period runs or is tolled?*

Topic: Employee Handbooks

Panelist: Member Kaplan

Intro Question: *Member Kaplan, for the last several years the Board has been extremely active in issuing decisions that validated, or invalidated, a wide variety of common Employee Handbook provisions. Most recently, the Board issued its expansive Handbook decision in Boeing.*

1. *Please discuss the Board's ruling in Boeing and its new framework for analyzing Employee Handbook provisions.*

Topic: Lawfulness of Arbitration Agreements Containing Class-Action Waivers

Panelist: Member Emmanuel

Intro Question: *Member Emmanuel, earlier this year the US Supreme Court issued its landmark decisions in Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris, and NLRB v. Murphy Oil USA, Inc.. The Court held that arbitration agreements entered into between employers and employees providing for arbitration to resolve employment disputes are enforceable, and are not rendered unlawful under either the Federal Arbitrations Act ("FAA") or the NLRA. Although the NLRA secures employees' right to organize and bargain collectively, the Court held that the NLRA does not include a right to class or collective actions.*

1. *Please discuss the impact of the Court's decision on the Board and how you see this decision impacting employers, unions, and employees in the future.*

Topic: NLRB ALJ Appointments After *Lucia v SEC*

Panelist: Member McFerran

Intro Question: *Member McFerran, the Supreme Court in Lucia v. SEC held that the SEC's ALJs were not properly Constitutionally appointed. As you can imagine, this decision sent shockwaves throughout the labor law bar because it raised the question about the status of the validity of the NLRB's ALJs.*

1. *What is the NLRB's position as to whether its ALJs are properly appointed?*
2. *How has the NLRB been dealing with subpoena requests, both for documents and testimony, related to the Constitutionality of its ALJs?*

Topic: NLRB Internal Ethics and Recusal Review

Panelists: Chairman Ring and Member Emmanuel

Intro Question: *Chairman Ring and Member Emmanuel, regardless of Administration, among the primary drivers in the erosion of the public's confidence in government are actual or perceived ethics problems.*

1. *What is the Board doing with regard to ensuring that its internal ethics and recusal processes are sound?*

Topic: NLRB's ADR Program

Panelist: Acting Executive Secretary Rothschild

Intro Question: *Acting Executive Secretary Rothschild, it is not fair if the Board has all of the fun up here, so we are going to put you on the hot seat for a moment. Historically, the Board has not emphasized the use of ADR in its litigation processes. This seems to be changing, however.*

1. *Please discuss the NLRB's new ADR initiative.*

From:	Ebrahim, Roufeda S.
To:	Rimbach, Thomas; Ring, John; Rubin, Mori; Cowen, William B. (b) (6) @morganlewis.com; (b) (6)
Cc:	Bashford, Jo Ann
Subject:	RE: Follow-Up -- Dial-in Info: Conference Call on Thurs. 1/31/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium
Date:	Tuesday, January 22, 2019 11:47:35 AM

Good morning,

A friendly reminder that your slides are due this **Friday, January 25**. Thank you all for your hard-work and cooperation.

Thank you,
Roufeda

From: Rimbach, Thomas
Sent: Wednesday, January 16, 2019 4:04 PM
To: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>; Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com (b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: Follow-Up -- Dial-in Info: Conference Call on Thurs. 1/31/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Hello everyone,

Thank you for your input on the conference call this afternoon! Just to recap, here is what we discussed:

1. **Materials due by Friday, 1/25/19**: Please send "finalized" PowerPoint slides and materials (e.g., case law, proposed regulations, G.C. memos, etc.) related to the issues you will primarily be discussing to the group by **Friday, 1/25/19**. The PowerPoint and materials must be in final format for LACBA to send out to symposium attendees. We should be able to make additions to the PowerPoint in February if necessary, however, in anticipation of potential new developments. Roufeda and I will merge everyone's slides together.

2. **Next conference call on Thursday, 1/31/19, at 2:00 p.m. PST**. We will be discussing the order of presentation, any issues with the material/PowerPoint, etc. (Dial-in at (b) (6) (b) (6) access code is (b) (6)).

3. **Format of Panel and Issues to be Covered**

    a. **1st portion of panel - Chairman John Ring** - 20-25 minute presentation (including 5 minutes of audience questions). Will focus primarily on issue of administrative rulemaking, particular in the context of joint employer status (and possibly elections/blocking charges); related recent D.C. Circuit decision; and updates on any new case law from the Board. Chairman Ring will then depart the panel after his

portion.

b. **2nd portion of panel - RDs Bill Cowen and Mori Rubin;** [redacted] – 45-minute presentation (including 5 minutes of audience questions). Given Mori's concern that any 1 issue will take about 10 or more minutes to thoroughly discuss, panelists may want to primarily focus on 1 topic each, given time limitations. (Total time for panel is 1 hour, 15 minutes.)

   i. **Regional Directors**: Will focus primarily on *Boeing* decision, related G.C. memo, different applications of *Boeing* (employer work rules). Regional Directors will also moderate as needed in order to solicit perspectives of [redacted] (union), [redacted] (management), and Regions themselves related to various issues raised by each panelist, including Chairman Ring. (RD Rubin will be in touch with RD Cowen upon his return from leave.)

   ii. [redacted] Will focus primarily on *PCC Structurals* decision (appropriate bargaining units) in the context of new union-organizing strategies, tools, and other remedies; alternatives to the Board's processes (e.g., strength of related state law/agencies such as DLSE).

   iii. [redacted] Depending on available time, will focus primarily on spillover of protests and strikes to non-union workforces (in the context of PCA/political activity; could potentially discuss recent *Alstate Maintenance* decision here); handling investigations (e.g., use of audio recordings); joint-employer status.

4. Just a reminder that all speakers are invited to join the LACBA symposium committee for dinner the evening of the symposium – we hope everyone can attend!

Thanks again and please let me and Roufeda know if you have any questions in the meantime!

Very best,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Ebrahim, Roufeda S.
Sent: Wednesday, January 16, 2019 3:11 PM
To: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; Ring, John <John.Ring@nlrb.gov>; Rubin, Mori

<Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>;
(b) (6) @morganlewis.com; (b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>; (b) (6) @morganlewis.com;
(b) (6) @bushgottlieb.com; (b) (6) @cohen-williams.com)
(b) (6) @cohen-williams.com>; (b) (6) @paulhastings.com>
Subject: Dial-in Info: Conference Call on Thurs. 1/31/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Good afternoon,

Panelists will submit their slides to the group by **Friday, January 25**. Our slides may include more subjects than what the panelists have time to present, but we will pare them down at our next session.

Our next conference call is scheduled for **Thursday, January 31st at 2:00 p.m. PST**. During that time, we will start with Chairman Ring who will give a run-down of his presentation (so-far); we do understand that there will be additions Chairman Ring makes to both the presentation and PowerPoint in February once additional Board decisions are released. Chairman Ring will leave the call and then the remaining panelists will assess which topics they reasonably have time left to present on, keeping in mind that we need to hold true to our panel's title and blurb because that is what the attendees are expecting. The dial-in information for that call is:

(b) (6)
Access code (b) (6)

In an attempt to assist/update you, shortly, Thomas will send out notes he took from today's meeting.

Thank you,
Roufeda

From: Rimbach, Thomas
Sent: Tuesday, January 15, 2019 11:38 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6)
(b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>; Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>; (b) (6) @morganlewis.com;
(b) (6) @bushgottlieb.com; (b) (6) @cohen-williams.com)
(b) (6) @cohen-williams.com>
Subject: Dial-in Info: Conference Call on Wed. 1/16/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Hello all,

For the conference call tomorrow (Wednesday) at 2:00 p.m. PST (5:00 p.m. for Chairman Ring), the dial-in information is:

(b) (6)
Access code: (b) (6)

Also copied are LACBA symposium committee members (b) (6)
(b) (6), if they are able to join in on the call and offer input.

Best regards,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Ebrahim, Roufeda S.
Sent: Monday, January 14, 2019 5:39 PM
To: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>; (b) (6) @paulhastings.com>
Subject: RE: Conference Call on Wed. 1/16/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Good evening,

A few points:

The agenda is nearly finalized and when it is, I can send it out to all of you. For now, here is the section of the agenda that applies to our session:

Fourth Plenary Session 2:45 p.m. – 4:00 p.m.
New Rules: Labor Law under the Trump Board

In this two-part discussion, join Chairman Ring of the NLRB as he discusses significant changes in labor law under the Trump administration, followed by the Los Angeles Regional Directors, union, and management-side panelists who will share their views on the implications of those changes. With issues ranging from joint employer status, administrative rulemaking, work rules, and the spillover of protests and strikes to non-union workforces, learn practical pointers that both labor and employment law practitioners need to know.

(b) (6), Morgan, Lewis & Bockius LLP
William B. Cowen, National Labor Relations Board, Region 21

(b) (6), UNITE HERE Local 11
John F. Ring, National Labor Relations Board
Mori Rubin, National Labor Relations Board, Region 31

All of the materials compiled by our panel are due by Thursday, January 31, 2019. Thomas and I will cover this more during our call this Wednesday, but it means that if our group decides to show a PowerPoint, chart, or any outlines, then we need to submit those materials to the committee by that deadline. Part of the reason for this deadline is that (most) all materials will be supplied to the attendees electronically prior to the conference.

Also, after the symposium, the committee is having a casual, relaxing dinner for the speakers and planning committee. We hope you can all attend and celebrate with us once the hard work is over!

Lastly, soon, Thomas will send the call in number for our call this **Wednesday at 2:00 pm.**

Thank you,
Roufeda

From: Rimbach, Thomas
Sent: Thursday, January 10, 2019 9:11 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) <(b) (6) @unitehere11.org>
Cc: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>; Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: Conference Call on Wed. 1/16/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Hello all,

Thank you for everyone's responses.

A conference call is scheduled for **2:00 p.m. PST on Wednesday, 1/16/19**. Everyone is available with the exception of Mr. Cowen – we will update him and solicit his input upon his return.

We will send out the dial-in information next week.

Very best,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
312 N. Spring St., 10th Floor

Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Rimbach, Thomas
Sent: Wednesday, January 9, 2019 10:16 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>
Subject: Follow Up: Conference call and PowerPoint preparation -- Labor Panel for March 5, 2019 LACBA Symposium

Good morning all,

Mori is available at **2 p.m. on Wed. 1/16; or 2 p.m. on Thurs. 1/17**. Bill is available in the **afternoon on Fri. 1/18**.

For those who have not yet responded, please let us know as soon as possible which of those times you are available for a conference call, and we will go ahead and schedule one when most panelists are available.

Also, LACBA will list everyone's names as follows in the program (names will be listed in alphabetical order) – please let me know if anything is incorrect.

(b) (6), Morgan, Lewis & Bockius LLP
William B. Cowen, National Labor Relations Board, Region 21
(b) (6), UNITE HERE Local 11
John F. Ring, National Labor Relations Board
Mori Rubin, National Labor Relations Board, Region 31

Very best,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
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Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Rimbach, Thomas
Sent: Monday, January 7, 2019 10:18 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B.

<William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6)
(b) (6) @unitehere11.org>
Cc: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>
Subject: Conference call and PowerPoint preparation -- Labor Panel for March 5, 2019 LACBA Symposium

Hello all and Happy New Year!

Hope everyone is well and enjoyed the holidays.

We are hoping to schedule a conference call next week – could you please e-mail me and Roufeda, and let us know of your availability on **January 16, 17, and/or 18, 2019**? We will use this call in order to discuss the format and content of a PowerPoint presentation for the labor panel at the March 5 symposium.

In advance of the conference call, we ask that everyone prepare an outline for the talking points that you will be able to contribute on the issues listed below in the panel description (as well as any additional topics that may be interesting to include). The outlines can be in the format of PowerPoint slides or simply in Word, and we can combine everything later into one version. Please also gather any materials such as case law, proposed rules, etc., as these will be sent to symposium participants.

As a reminder, here is the description of the panel:

> "In this two-part discussion, join Chairman Ring of the National Labor Relations Board as he discusses significant changes in labor law under the Trump administration, followed by the Los Angeles Regional Directors, union, and management-side panelists discussing the implications of those changes. With issues ranging from joint employer status, administrative rulemaking, work rules, and the spillover of protests and strikes to non-union workforces, learn practical pointers that labor and employment law practitioners alike will want to know."

Please let us know if you have any questions.

Very best,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Ebrahim, Roufeda S.

Sent: Thursday, December 20, 2018 10:17 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; (b) (6) (b) (6) @paulhastings.com>
Subject: LACBA Symposium: modification to our session

Good morning,

I am emailing to inform you that we have a slight modification to our session. Due to various concerns raised by the NLRB's Ethics department, we need to make a modification to our session so that Chairman Ring can still participate. We are splitting up the session so that Chairman Ring will start the session speaking alone for about 20-25 minutes with about five minutes of questions from the audience. Chairman Ring will then remove himself from the stage/room, and then outside of his presence, the remaining panelists (Mori, Bill, (b) (6) will speak for the time remaining. Other than this modification, all else will remain the same in terms of presentation subject matter, etc.

This is the session blurb we are considering that will address this change to the session:

"In this two-part discussion, join Chairman Ring of the National Labor Relations Board as he discusses significant changes in labor law under the Trump administration, followed by the Los Angeles Regional Directors, union, and management-side panelists discussing the implications of those changes. With issues ranging from joint employer status, administrative rulemaking, work rules, and the spillover of protests and strikes to non-union workforces, learn practical pointers that labor and employment law practitioners alike will want to know."

Please let me know as soon as possible if you have any concerns.

Thank you,
Roufeda

From: Ebrahim, Roufeda S.
Sent: Thursday, December 13, 2018 7:32 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>
Subject: RE: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

Good morning,

Just a friendly reminder to submit your 2-3 sentence blurbs today. Also, please let us know what session title you prefer.

Thank you,
Roufeda

From: Ebrahim, Roufeda S.
Sent: Monday, December 10, 2018 12:45 PM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com' (b) (6) @morganlewis.com>;(b) (6) @unitehere11.org>
Cc: (b) (6) @paulhastings.com>; (b) (6) @morganlewis.com' (b) (6) @morganlewis.com>; (b) (6) @bushgottlieb.com' (b) (6) @bushgottlieb.com>; (b) (6) @nlrb.gov>; (b) (6) (b) (6) @cohen-williams.com)' (b) (6) @cohen-williams.com>; (b) (6) @helmerfriedman.com' (b) (6) @helmerfriedman.com>
Subject: RE: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

Yet another email, but we just received some important guidance from the committee that may be helpful to you when preparing your blurbs:

We need to be sure to incorporate practical pointers, and also keeping in mind that a big portion of the audience will be employment lawyers who do not practice labor law. The hope is that this program will attract a lot of labor lawyers to the Symposium, but we want to keep the employment lawyers interested too.

From: Ebrahim, Roufeda S.
Sent: Monday, December 10, 2018 12:30 PM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com;(b) (6) (b) (6) @unitehere11.org>
Cc: (b) (6) @paulhastings.com>;(b) (6) @morganlewis.com; (b) (6) @bushgottlieb.com; Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; (b) (6) (b) (6) @cohen-williams.com) (b) (6) @cohen-williams.com>; (b) (6) @helmerfriedman.com
Subject: RE: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

My apologies for the additional email, but I failed the mention the following - Please plan and prepare for this session to remain/be a "traditional labor law" session. The mention of overlap with employment law really is not our concern (at least at this time). (b) (6) will manage that portion. Really, the purpose of identifying our session's overlap with employment law is, in part, for advertising purposes (so that we can figure out how to make traditional labor law appeal to employment law practitioners).

From: Ebrahim, Roufeda S.
Sent: Monday, December 10, 2018 12:22 PM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: (b) (6) @paulhastings.com>; (b) (6) @morganlewis.com; (b) (6) @bushgottlieb.com; Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; (b) (6) (b) (6) @cohen-williams.com) (b) (6) @cohen-williams.com>; (b) (6) @helmerfriedman.com
Subject: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

All,

Great call this morning! We covered a lot of ground in such a short amount of time. Based on our discussion, here are some proposed titles for our session. Please feel free to make modifications to the below proposals and/or propose your own titles. Regardless, please let us know what title you prefer.

1. Labor in the Time of Trump
2. Labor in the Trump Era
3. Developments Under the Trump Board
4. The NLRB under Trump

Discussion topics we discussed during our call:

- Joint employer status (per Chairman Ring, this is a current hot topic and thus will serve as one of the pillar discussion points for our session)
- Administrative rule making (per Chairman Ring, this is a current hot topic and thus will serve as one of the pillar discussion points for our session)
- Per Chairman Ring, there may be developing topics between now and March 5, 2019. That said, we all agreed to keep some flexibility to include those topics in our session should they arise
- Who has the right to unionize (independent contractors vs. employees vs. agency workers) (*PCC Structurals*)
    - This did not come up on the call, but misclassification of independent contractors could be an independent violation
- New organizing tactics
- Decline in R-case filings
- Voluntary agreements
- Strikes in non-union settings vs. union settings and impact on business

- Work rules under *Boeing*
- This did not come up on the call, but would the panelists like to discuss arbitration agreements (*Epic Systems*)?

These notes are not infallible so if we left anything out, please feel free to add it.

Per our discussion, by **Wednesday, December 10**, we agreed that everyone would write and submit a short 2-3 sentence blurb covering their talking points at the session. Once you submit your blurb, Thomas and I will do our best to combine them into one. Once we do that, we will send a draft to all of you for input before we finalize it and send it to the committee on/before December 17 for review/approval.

Very truly yours,

Roufeda S. Ebrahim
Field Attorney
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064
Direct: (310) 307-7331
Cell: (202) 427-2106
Fax: (310) 235-7420
http://www.nlrb.gov

From:	Rubin, Mori
To:	Rimbach, Thomas; Ebrahim, Roufeda S.; Ring, John; Cowen, William B.; (b) (6) o@morganlewis.com; (b) (6)
Cc:	Bashford, Jo Ann
Subject:	RE: Follow-Up -- Dial-in Info: Conference Call on Thurs. 1/31/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium
Date:	Wednesday, January 16, 2019 7:13:18 PM

Thank you. I decided to quickly prepare a PowerPoint for the RD topic and will get it to you tonight. It should be about 7-10 slides. Bill can modify/edit it after he returns.

Mori Rubin
(she/her/hers)
Regional Director, Region 31
National Labor Relations Board
11500 W. Olympic Blvd. #600
Los Angeles, CA 90064
(310)307-7306

From: Rimbach, Thomas
Sent: Wednesday, January 16, 2019 4:04 PM
To: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>; Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: Follow-Up -- Dial-in Info: Conference Call on Thurs. 1/31/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Hello everyone,

Thank you for your input on the conference call this afternoon! Just to recap, here is what we discussed:

1. **Materials due by Friday, 1/25/19**: Please send "finalized" PowerPoint slides and materials (e.g., case law, proposed regulations, G.C. memos, etc.) related to the issues you will primarily be discussing to the group by **Friday, 1/25/19**. The PowerPoint and materials must be in final format for LACBA to send out to symposium attendees. We should be able to make additions to the PowerPoint in February if necessary, however, in anticipation of potential new developments. Roufeda and I will merge everyone's slides together.

2. **Next conference call on Thursday, 1/31/19, at 2:00 p.m. PST**. We will be discussing the order of presentation, any issues with the material/PowerPoint, etc. (Dial-in at (b) (6) (b) (6) access code is (b) (6)).

3. **Format of Panel and Issues to be Covered**

   a. **1st portion of panel - Chairman John Ring** - 20-25 minute presentation (including 5 minutes of audience questions). Will focus primarily on issue of administrative rulemaking, particular in the context of joint employer status (and possibly elections/blocking charges); related recent D.C. Circuit decision; and updates on any new case law from the Board. Chairman Ring will then depart the panel after his portion.

   b. **2nd portion of panel - RDs Bill Cowen and Mori Rubin;** [redacted] 45-minute presentation (including 5 minutes of audience questions). Given Mori's concern that any 1 issue will take about 10 or more minutes to thoroughly discuss, panelists may want to primarily focus on 1 topic each, given time limitations. (Total time for panel is 1 hour, 15 minutes.)

      i. **Regional Directors**: Will focus primarily on *Boeing* decision, related G.C. memo, different applications of *Boeing* (employer work rules). Regional Directors will also moderate as needed in order to solicit perspectives of [redacted] (union), [redacted] (management), and Regions themselves related to various issues raised by each panelist, including Chairman Ring. (RD Rubin will be in touch with RD Cowen upon his return from leave.)

      ii. [redacted] (Will focus primarily on *PCC Structurals* decision (appropriate bargaining units) in the context of new union-organizing strategies, tools, and other remedies; alternatives to the Board's processes (e.g., strength of related state law/agencies such as DLSE).

      iii. [redacted] Depending on available time, will focus primarily on spillover of protests and strikes to non-union workforces (in the context of PCA/political activity; could potentially discuss recent *Alstate Maintenance* decision here); handling investigations (e.g., use of audio recordings); joint-employer status.

4. Just a reminder that all speakers are invited to join the LACBA symposium committee for dinner the evening of the symposium – we hope everyone can attend!

Thanks again and please let me and Roufeda know if you have any questions in the meantime!

Very best,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:

312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Ebrahim, Roufeda S.
Sent: Wednesday, January 16, 2019 3:11 PM
To: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com;(b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>;(b) (6) @morganlewis.com; (b) (6) @bushgottlieb.com;(b) (6) @cohen-williams.com) (b) (6) @cohen-williams.com>;(b) (6) @paulhastings.com>
Subject: Dial-in Info: Conference Call on Thurs. 1/31/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Good afternoon,

Panelists will submit their slides to the group by **Friday, January 25**. Our slides may include more subjects than what the panelists have time to present, but we will pare them down at our next session.

Our next conference call is scheduled for **Thursday, January 31st at 2:00 p.m. PST**. During that time, we will start with Chairman Ring who will give a run-down of his presentation (so-far); we do understand that there will be additions Chairman Ring makes to both the presentation and PowerPoint in February once additional Board decisions are released. Chairman Ring will leave the call and then the remaining panelists will assess which topics they reasonably have time left to present on, keeping in mind that we need to hold true to our panel's title and blurb because that is what the attendees are expecting. The dial-in information for that call is:

(b) (6)
Access code (b) (6)

In an attempt to assist/update you, shortly, Thomas will send out notes he took from today's meeting.

Thank you,
Roufeda

From: Rimbach, Thomas
Sent: Tuesday, January 15, 2019 11:38 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>;(b) (6) @morganlewis.com;(b) (6) (b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>; Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>;(b) (6) @morganlewis.com; (b) (6) @bushgottlieb.com;(b) (6) @cohen-williams.com)

(b) (6) @cohen-williams.com>
Subject: Dial-in Info: Conference Call on Wed. 1/16/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Hello all,

For the conference call tomorrow (Wednesday) at 2:00 p.m. PST (5:00 p.m. for Chairman Ring), the dial-in information is:

(b) (6)
Access code: (b) (6)

Also copied are LACBA symposium committee members (b) (6) (b) (6) if they are able to join in on the call and offer input.

Best regards,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
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From: Ebrahim, Roufeda S.
Sent: Monday, January 14, 2019 5:39 PM
To: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) @unitehere11.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>; (b) (6) @paulhastings.com>
Subject: RE: Conference Call on Wed. 1/16/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Good evening,

A few points:

The agenda is nearly finalized and when it is, I can send it out to all of you. For now, here is the section of the agenda that applies to our session:

Fourth Plenary Session 2:45 p.m. – 4:00 p.m.
New Rules: Labor Law under the Trump Board

In this two-part discussion, join Chairman Ring of the NLRB as he discusses significant changes in

labor law under the Trump administration, followed by the Los Angeles Regional Directors, union, and management-side panelists who will share their views on the implications of those changes. With issues ranging from joint employer status, administrative rulemaking, work rules, and the spillover of protests and strikes to non-union workforces, learn practical pointers that both labor and employment law practitioners need to know.

(b) (6), Morgan, Lewis & Bockius LLP
William B. Cowen, National Labor Relations Board, Region 21
(b) (6), UNITE HERE Local 11
John F. Ring, National Labor Relations Board
Mori Rubin, National Labor Relations Board, Region 31

All of the materials compiled by our panel are due by Thursday, January 31, 2019. Thomas and I will cover this more during our call this Wednesday, but it means that if our group decides to show a PowerPoint, chart, or any outlines, then we need to submit those materials to the committee by that deadline. Part of the reason for this deadline is that (most) all materials will be supplied to the attendees electronically prior to the conference.

Also, after the symposium, the committee is having a casual, relaxing dinner for the speakers and planning committee. We hope you can all attend and celebrate with us once the hard work is over!

Lastly, soon, Thomas will send the call in number for our call this **Wednesday at 2:00 pm.**

Thank you,
Roufeda

From: Rimbach, Thomas
Sent: Thursday, January 10, 2019 9:11 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>; Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: Conference Call on Wed. 1/16/19 at 2:00pm PST -- Labor Panel for March 5, 2019 LACBA Symposium

Hello all,

Thank you for everyone's responses.

A conference call is scheduled for **2:00 p.m. PST on Wednesday, 1/16/19**. Everyone is available with the exception of Mr. Cowen – we will update him and solicit his input upon his return.

We will send out the dial-in information next week.

Very best,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Rimbach, Thomas
Sent: Wednesday, January 9, 2019 10:16 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>
Subject: Follow Up: Conference call and PowerPoint preparation -- Labor Panel for March 5, 2019 LACBA Symposium

Good morning all,

Mori is available at **2 p.m. on Wed. 1/16; or 2 p.m. on Thurs. 1/17**. Bill is available in the **afternoon on Fri. 1/18**.

For those who have not yet responded, please let us know as soon as possible which of those times you are available for a conference call, and we will go ahead and schedule one when most panelists are available.

Also, LACBA will list everyone's names as follows in the program (names will be listed in alphabetical order) – please let me know if anything is incorrect.

(b) (6), Morgan, Lewis & Bockius LLP
William B. Cowen, National Labor Relations Board, Region 21
(b) (6), UNITE HERE Local 11
John F. Ring, National Labor Relations Board
Mori Rubin, National Labor Relations Board, Region 31

Very best,
Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:

312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
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From: Rimbach, Thomas
Sent: Monday, January 7, 2019 10:18 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: Ebrahim, Roufeda S. <Roufeda.Ebrahim@nlrb.gov>
Subject: Conference call and PowerPoint preparation -- Labor Panel for March 5, 2019 LACBA Symposium

Hello all and Happy New Year!

Hope everyone is well and enjoyed the holidays.

We are hoping to schedule a conference call next week – could you please e-mail me and Roufeda, and let us know of your availability on **January 16, 17, and/or 18, 2019**? We will use this call in order to discuss the format and content of a PowerPoint presentation for the labor panel at the March 5 symposium.

In advance of the conference call, we ask that everyone prepare an outline for the talking points that you will be able to contribute on the issues listed below in the panel description (as well as any additional topics that may be interesting to include). The outlines can be in the format of PowerPoint slides or simply in Word, and we can combine everything later into one version. Please also gather any materials such as case law, proposed rules, etc., as these will be sent to symposium participants.

As a reminder, here is the description of the panel:

> "In this two-part discussion, join Chairman Ring of the National Labor Relations Board as he discusses significant changes in labor law under the Trump administration, followed by the Los Angeles Regional Directors, union, and management-side panelists discussing the implications of those changes. With issues ranging from joint employer status, administrative rulemaking, work rules, and the spillover of protests and strikes to non-union workforces, learn practical pointers that labor and employment law practitioners alike will want to know."

Please let us know if you have any questions.

Very best,
Thomas

Thomas Rimbach, Field Attorney

National Labor Relations Board, Region 21
Please note our new office location as of 11/5/18:
312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

From: Ebrahim, Roufeda S.
Sent: Thursday, December 20, 2018 10:17 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) <(b) (6) @unitehere11.org>
Cc: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; (b) (6) (b) (6) @paulhastings.com>
Subject: LACBA Symposium: modification to our session

Good morning,

I am emailing to inform you that we have a slight modification to our session. Due to various concerns raised by the NLRB's Ethics department, we need to make a modification to our session so that Chairman Ring can still participate. We are splitting up the session so that Chairman Ring will start the session speaking alone for about 20-25 minutes with about five minutes of questions from the audience. Chairman Ring will then remove himself from the stage/room, and then outside of his presence, the remaining panelists (Mori, Bill, (b) (6)) will speak for the time remaining. Other than this modification, all else will remain the same in terms of presentation subject matter, etc.

This is the session blurb we are considering that will address this change to the session:

"In this two-part discussion, join Chairman Ring of the National Labor Relations Board as he discusses significant changes in labor law under the Trump administration, followed by the Los Angeles Regional Directors, union, and management-side panelists discussing the implications of those changes. With issues ranging from joint employer status, administrative rulemaking, work rules, and the spillover of protests and strikes to non-union workforces, learn practical pointers that labor and employment law practitioners alike will want to know."

Please let me know as soon as possible if you have any concerns.

Thank you,
Roufeda

From: Ebrahim, Roufeda S.
Sent: Thursday, December 13, 2018 7:32 AM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>

Subject: RE: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

Good morning,

Just a friendly reminder to submit your 2-3 sentence blurbs today. Also, please let us know what session title you prefer.

Thank you,
Roufeda

From: Ebrahim, Roufeda S.
Sent: Monday, December 10, 2018 12:45 PM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com' (b) (6) @morganlewis.com>; (b) (6) @unitehere11.org>
Cc: (b) (6) @paulhastings.com>; (b) (6) @morganlewis.com' (b) (6) @morganlewis.com>; (b) (6) @bushgottlieb.com' (b) (6) @bushgottlieb.com>; Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; (b) (6) (b) (6) @cohen-williams.com)' (b) (6) @cohen-williams.com>; (b) (6) @helmerfriedman.com' (b) (6) @helmerfriedman.com>
Subject: RE: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

Yet another email, but we just received some important guidance from the committee that may be helpful to you when preparing your blurbs:

We need to be sure to incorporate practical pointers, and also keeping in mind that a big portion of the audience will be employment lawyers who do not practice labor law. The hope is that this program will attract a lot of labor lawyers to the Symposium, but we want to keep the employment lawyers interested too.

From: Ebrahim, Roufeda S.
Sent: Monday, December 10, 2018 12:30 PM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) ano@morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: (b) (6) (b) (6) @paulhastings.com>; (b) (6) @morganlewis.com; (b) (6) @bushgottlieb.com; Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; (b) (6) (b) (6) @cohen-williams.com) (b) (6) @cohen-williams.com>; (b) (6) @helmerfriedman.com
Subject: RE: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

My apologies for the additional email, but I failed the mention the following - Please plan and prepare for this session to remain/be a "traditional labor law" session. The mention of overlap with employment law really is not our concern (at least at this time). (b) (6) will manage that portion. Really, the purpose of identifying our session's overlap with employment law is, in part, for advertising purposes (so that we can figure out how to make traditional labor law appeal to employment law practitioners).

From: Ebrahim, Roufeda S.
Sent: Monday, December 10, 2018 12:22 PM
To: Ring, John <John.Ring@nlrb.gov>; Rubin, Mori <Mori.Rubin@nlrb.gov>; Cowen, William B. <William.Cowen@nlrb.gov>; (b) (6) @morganlewis.com; (b) (6) (b) (6) @unitehere11.org>
Cc: (b) (6) ott@paulhastings.com>; (b) (6) s@morganlewis.com; (b) (6) @bushgottlieb.com; Rimbach, Thomas <Thomas.Rimbach@nlrb.gov>; (b) (6) (b) (6) @cohen-williams.com) (b) (6) @cohen-williams.com>; (b) (6) @helmerfriedman.com
Subject: LACBA Symposium: Tasks 1 and 2 (topics for discussion and session title)

All,

Great call this morning! We covered a lot of ground in such a short amount of time. Based on our discussion, here are some proposed titles for our session. Please feel free to make modifications to the below proposals and/or propose your own titles. Regardless, please let us know what title you prefer.

1. Labor in the Time of Trump
2. Labor in the Trump Era
3. Developments Under the Trump Board
4. The NLRB under Trump

Discussion topics we discussed during our call:

- Joint employer status (per Chairman Ring, this is a current hot topic and thus will serve as one of the pillar discussion points for our session)
- Administrative rule making (per Chairman Ring, this is a current hot topic and thus will serve as one of the pillar discussion points for our session)
- Per Chairman Ring, there may be developing topics between now and March 5, 2019. That said, we all agreed to keep some flexibility to include those topics in our session should they arise
- Who has the right to unionize (independent contractors vs. employees vs.

agency workers) (*PCC Structurals*)
    - This did not come up on the call, but misclassification of independent contractors could be an independent violation
- New organizing tactics
- Decline in R-case filings
- Voluntary agreements
- Strikes in non-union settings vs. union settings and impact on business
- Work rules under *Boeing*
- This did not come up on the call, but would the panelists like to discuss arbitration agreements (*Epic Systems*)?

These notes are not infallible so if we left anything out, please feel free to add it.

Per our discussion, by **Wednesday, December 10**, we agreed that everyone would write and submit a short 2-3 sentence blurb covering their talking points at the session. Once you submit your blurb, Thomas and I will do our best to combine them into one. Once we do that, we will send a draft to all of you for input before we finalize it and send it to the committee on/before December 17 for review/approval.

Very truly yours,

Roufeda S. Ebrahim
Field Attorney
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064
Direct: (310) 307-7331
Cell: (202) 427-2106
Fax: (310) 235-7420
http://www.nlrb.gov

From:	Ebrahim, Roufeda S.
To:	Ring, John; Rubin, Mori; (b) (6) @morganlewis.com; Cowen, William B. (b) (6)
Cc:	Bashford, Jo Ann; (b) (6)
Subject:	Labor Panel Part 1 - March 5, 2019 LACBA Symposium
Date:	Wednesday, January 30, 2019 7:01:02 PM
Attachments:	Ring slides.pptx Proposed Joint Employer Standard - NLRB Fact Sheet.pdf Proposed Joint Employer Standard - Federal Register.pdf Alstate Maintenance (NLRB 2019).pdf Super Shuttle (NLRB 2019).pdf

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Hello all,

Thank you everyone for submitting PowerPoint slides – they look great.

A friendly reminder that we have a conference scheduled at **2:00 p.m. PST, tomorrow** (Thurs. 1/31/19), to discuss the slides and the panel. The dial in and access code are as follows:

Dial-in: (b) (6)
Access code: (b) (6)

Attached is Chairman Ring's PowerPoint slide for his portion of the presentation (20-25 minutes including 5 minutes of audience questions). We made one modification, which was simply to add the case citation for the two cases referenced on the slide (*Alstate Maintenance* and *Super Shuttle*).

With respect to material to distribute to symposium attendees that is relevant to Chairman Ring's portion of the panel, we thought the following would be helpful:

-proposed joint employer standard – NLRB Fact Sheet
-proposed joint employer standard – federal register
-Alstate Maintenance – Board decision
-Super Shuttle – Board decision

These are attached to this e-mail.

Chairman Ring – could you please let us know tomorrow on the call if the changes to the PowerPoint slide is acceptable to you, as well as providing the material listed above to symposium attendees? Please also let us know if there is any other material you believe would be helpful to distribute.

We will be sending a separate e-mail to just RD Rubin, RD Cowen, (b) (6), attaching the other slides and material, so that we can preemptively avoid any ethical issues that may arise from discussions between Chairman Ring and the RDs and practitioners. After we discuss everyone's slides and the format of the presentation, we will format them to match each other stylistically, so it looks like one coherent PowerPoint.

Best regards,
Roufeda and Thomas

Thomas Rimbach, Field Attorney
National Labor Relations Board, Region 21

Please note our new office location as of 11/5/18:

312 N. Spring St., 10th Floor
Los Angeles, CA 90012
Phone: 213-634-6411
Fax: 213-894-2778

WHAT'S GOING ON AT THE NATIONAL LABOR RELATIONS BOARD
CHAIRMAN JOHN F. RING

- GENERAL NLRB UPDATE
- RULEMAKING
  - JOINT-EMPLOYER STANDARD
  - ELECTION RULES
  - OTHER
- NOTABLE CASE
  - PROTECTED CONCERTED ACTIVITY – *ALSTATE MAINTENANCE*, 367 NLRB No. 68 (2019)
  - INDEPENDENT CONTRACTOR – *SUPER SHUTTLE*, 367 NLRB No. 75 (2019)
- OTHER EEO-RELATED ISSUES

NLRB FACT SHEET

Proposed Rule Regarding the Standard for Determining Joint-Employer Status

OVERVIEW

The National Labor Relations Board's (NLRB) proposed rule would change the standard for determining whether one employer can be found to be a joint employer of another employer's employees.

AT-A-GLANCE

- The proposed rule reflects a return to the previously longstanding standard that an employer may be considered a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.

- The intent of the proposed rule is to foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability.

- Since 2015, there has been instability in the law regarding whether a company shares or codetermines the essential terms and conditions of another employer's employees when it indirectly influences those terms and conditions, has never invoked a contractual reservation of authority to set them, or has exercised authority that is merely "limited and routine," such as by instructing employees where and when to perform work, but not how to perform it.

- The change to current law that would be effectuated by the proposed rule, should it become final after notice and comment, would be that a company could no longer be deemed to be a joint employer of another employer's workers based solely on its indirect influence, a contractual reservation of authority that the company has never exercised, or its exercise of only "limited and routine" authority.

- Under the National Labor Relations Act, the legal consequences of a joint-employer finding are significant. The Board may compel a joint employer to bargain over the terms and conditions of employees employed by another employer. Also, each company comprising the joint employer may be found jointly and severally liable for the other's unfair labor practices. And a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

- The proposed rule reflects the Board's initial view, subject to potential revision in response to comments, that the Act's purposes would not be furthered by drawing into a collective-bargaining relationship, or exposing to joint-and-several liability, the business partner of an employer where the business partner does not actively participate in decisions setting the employees' wages, benefits, and other essential terms and conditions of employment.

ADDITIONAL INFORMATION

The Board seeks public comment on all aspects of its proposed rule. As specified in the Notice of Proposed Rulemaking, published in the Federal Register on September 14, 2018, public comments may be submitted electronically or in hard copy.

The proposed rule may be found at:
https://www.federalregister.gov/documents/2018/09/14/2018-19930/definition-of-joint-employer

The Board will review the public comments and work to promulgate a final rule that clarifies the joint-employer standard in a way that promotes meaningful collective bargaining and advances the purposes of the Act.

Alstate Maintenance, LLC *and* Trevor Greenidge.
Case 29–CA–117101

January 11, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

Employee Trevor Greenidge, a skycap at Kennedy International Airport, was discharged for griping about not being tipped. The Region issued a complaint alleging that Greenidge had been discharged for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act. The judge dismissed the complaint. The General Counsel excepts, contending, among other things, that because Greenidge spoke in the presence of other skycaps and a supervisor and included the word "we" in his statement, a finding that the statement qualifies as concerted activity is compelled by the Board's decisions in *Whittaker Corp.*, 289 NLRB 933 (1988); *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000), enfd. 262 F.3d 184 (2d Cir. 2001); and *WorldMark by Wyndham*, 356 NLRB 765 (2011).

The right to engage in protected concerted activity is one of the most fundamental rights guaranteed by Section 7 of the NLRA. The importance of this right requires us to ensure that the standard for determining whether a particular action qualifies as "concerted" enables the Board to preserve the distinction between group and individual complaints. The applicable standard should not sanction an all-but-meaningless inquiry in which concertedness hinges on whether a speaker uses the first-person plural pronoun in the presence of fellow employees and a supervisor. In addition, the protection afforded by the Act to engage in protected concerted activity requires a clear standard that can be relied upon by employees who seek to engage in such activity and by employers who must determine whether particular employee conduct is within or outside the protection of the Act.

The Board articulated such a standard more than three decades ago in the *Meyers Industries* cases.[1] But even though the *Meyers* decisions have never been overruled, subsequent decisions—including, as relevant here, *WorldMark by Wyndham*—have deviated from *Meyers* and blurred the distinction between protected group action and unprotected individual action. Our decision today begins the process of restoring the *Meyers* standard by overruling conflicting precedent that erroneously shields individual action and thereby undermines congressional intent to limit the protection afforded under the Act to *concerted* activity for the purpose of mutual aid or protection.[2]

As explained below, we find the cases relied upon by the General Counsel are starkly inapposite and do not support the finding he advocates. Additionally, although we believe *WorldMark by Wyndham* is distinguishable, we conclude that *WorldMark* cannot be reconciled with *Meyers Industries* and must be overruled. We also find that even if Greenidge's remark was concerted activity, it was not *protected* concerted activity because it did not have mutual aid or protection as its purpose. Accordingly, we adopt the judge's recommended Order and dismiss the complaint.[3]

Facts

The Respondent provides ground services at JFK International Airport's terminal one under a contract with Terminal One Management, Inc. (Terminal One). Lufthansa Airlines operates out of JFK terminal one. Greenidge was employed by the Respondent as a skycap; his job was to assist arriving airline passengers with their luggage outside the entrance to the terminal. The bulk of skycaps' compensation comes from passengers' tips.

[1] *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[2] Although we do not reach them here, other cases that arguably conflict with *Meyers* include those in which the Board has deemed statements about certain subjects "inherently" concerted. See *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990) (discussions about wages inherently concerted), enf. denied mem. 927 F.2d 597 (4th Cir. 1991); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussions about work schedules inherently concerted), enf. denied in relevant part 81 F.3d 209 (D.C. Cir. 1996); *Hoodview Vending Co.*, 362 NLRB 690 (2015), incorporating by reference 359 NLRB 355 (2012) (discussions about job security inherently concerted). We would be interested in reconsidering this line of precedent in a future appropriate case.

[3] On June 24, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order dismissing the complaint in its entirety.

The General Counsel has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

On July 17, 2013, Greenidge was working with three other skycaps outside the entrance to terminal one. He was approached by his supervisor, Cebon Crawford, who informed Greenidge that Lufthansa had requested skycaps to assist with a soccer team's equipment. Greenidge remarked, "We did a similar job a year prior and we didn't receive a tip for it." When a van containing the team's equipment arrived, the skycaps were waved over by Isabelle Roeder and Klaudia Fitzgerald, managers from Lufthansa Airlines and Terminal One, respectively. The skycaps walked away. The two managers questioned Crawford, who told them the skycaps did not want to do the job because they were anticipating a small tip. Greenidge testified that he was about 50 feet away and did not hear what Crawford said to the managers. The managers then sought assistance from baggage handlers inside the terminal, who completed a significant share of the work before Greenidge and the other three skycaps helped them finish the job. After the job was completed, the soccer team gave the skycaps an $83 tip.[4]

That evening, Fitzgerald emailed Terminal One managers to alert them that the skycaps had provided subpar service to a group Lufthansa considered a VIP client. Fitzgerald questioned why the skycaps "would refuse to provide skycap services to a partner carrier" and stated that "in [her] entire professional career [she had] never been this embarrassed in front of the customer." After a series of emails, Terminal One Manager Deb Traynor decided that the employment of all four skycaps would be terminated. The skycaps were subsequently discharged; Greenidge's discharge letter stated:

> You were indifferent to the customer and verbally make [sic] comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [sic] in front of other skycaps, Terminal One Mod [manager on duty] and the Station Manager of Lufthansa.[5]

Discussion

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by discharging Greenidge because Greenidge's complaint about the tipping habits of soccer players was neither concerted activity nor was it undertaken for the purpose of mutual aid or protection. For the following reasons, we agree.

A. Greenidge's Comment Was Not Concerted Activity.

In relevant part, Section 7 of the Act gives employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities for the purpose of* collective bargaining or other *mutual aid or protection*" (emphasis added). Thus, for employees to enjoy the protection of the Act under the language of Section 7 italicized above, two elements must be satisfied: the activity they engage in must be "concerted," and the concerted activity must be engaged in "for the purpose of . . . mutual aid or protection."

The governing standards for determining whether an activity is concerted are set forth in the Board's decisions in *Meyers Industries*.[6] In *Meyers I*, the Board held that "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[7] Subsequently, in *Meyers II*, the Board responded to several questions posed by the Court of Appeals for the D.C. Circuit regarding whether the *Meyers I* definition of concertedness encompasses individual activity. Two of the court's questions, and the Board's responses to those questions, are relevant here.

[4] The dissent places considerable emphasis on the fact that Crawford communicated Greenidge's complaint to Managers Roeder and Fitzgerald. To the extent she means to suggest that Greenidge and the other three skycaps ended their "walk away" protest *because* Crawford did so, the facts would belie such an inference. First, Greenidge testified that he was standing about 50 feet away from Crawford when Crawford was speaking with Roeder and Fitzgerald, and he did not hear what Crawford said to them. Second, as the dissent acknowledges, inside baggage handlers were brought outside to do the job the skycaps were refusing to do. The dissent does not acknowledge, however, that it was only after the baggage handlers had completed a significant share of the work that the skycaps began to help. Thus, it is clear that the skycaps got to work *not* because Crawford relayed Greenidge's complaint to the managers, but because the skycaps saw that someone else was doing the job and decided it was better to join in and *risk* getting no tip than to stay away and be *certain* not to get one.

[5] Our dissenting colleague states that "[e]ven with the skycaps' initial delay, the team's equipment and luggage was moved into the terminal in 12 minutes." "No harm, no foul," she appears to suggest. We could not disagree more. The length of the delay and its ultimate effect are irrelevant; what matters here was that Greenidge was "indifferent to the customer," as his discharge letter states. Failure to respond to a customer's request can mean loss of business, and of jobs. Greenidge's selfish stunt caused the customer to complain, and failure to remedy the source of that complaint could have resulted in the Respondent losing its contract with Terminal One Management, jeopardizing all the skycaps' jobs. We recognize, of course, that under the Act, employees have a protected right to strike, and the fact that a strike could also result in a loss of contract and jobs does not deprive strikers of the Act's protection. But what happened here was mere insubordination, not a protected strike. Indeed, a case could be made that the skycaps' act of walking away was an unprotected partial strike. See infra fn. 16.

[6] See fn. 1, supra.

[7] *Meyers I*, 268 NLRB at 497.

First, the court asked whether *Meyers I* is consistent with cases in which "concerted activity was found where an individual, not a designated spokesman, brought a group complaint to the attention of management."[8] The Board answered in the affirmative, stating:

> *Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether "specifically authorized" in a formal agency sense, or otherwise, we shall find the conduct to be concerted.[9]

The Board reiterated this point in a later passage in *Meyers II*, stating that the *Meyers I* definition of concertedness "encompasses those circumstances where individual employees . . . bring[] truly group complaints to the attention of management."[10] Thus, under *Meyers II*, an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of "group activities"—e.g., prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a "truly group complaint," as opposed to a purely personal grievance. Absent such evidence, there is no basis to find that an individual employee who complains to management about a term or condition of employment is acting other than solely by and on behalf of him- or herself.

Second, the court asked whether the *Meyers I* standard "would protect an individual's efforts to induce group action."[11] The Board in *Meyers II* answered this question in the affirmative as well, explaining that a single employee's efforts to "induce group action" would be deemed concerted based on "the view of concertedness exemplified by the *Mushroom Transportation* line of cases," which the Board in *Meyers II* "fully embraced."[12] In *Mushroom Transportation Company, Inc. v. NLRB*,[13] the Court of Appeals for the Third Circuit held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees."[14] The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"[15]

Applying the *Meyers II* standard here, we find that Greenidge did not engage in concerted activity.

Preliminarily, it is important to clarify what is not at issue here: the skycaps' act of walking away from the arriving van. In his decision, Judge Green states that "[t]he entire theory of the General Counsel's case is that on July 17, 2013, Greenidge engaged in concerted activity when, while waiting for the arrival of the van carrying a French soccer team, he said . . . : 'We did a similar job a year prior and we didn't receive a tip for it.'" The judge is correct that the General Counsel's theory of the case was strictly limited to the allegation that Greenidge's *statement* constituted protected concerted activity. In paragraph 5(a) of the complaint, the General Counsel alleged that "the Charging Party engaged in concerted activities with other employees for the purpose of mutual aid and protection by complaining that the amount of tips received for performing services to a certain customer may be unsatisfactory." At the beginning of the hearing, Judge Green asked counsel for the General Counsel: "So why do you think that he was—what was his—what are you claiming his Protected Concerted Activity was?" Counsel replied: "He was engaged in conversations with his Co-Workers about tips" (Tr. 6). Consistent with the complaint and counsel's statement at the hearing, the General Counsel's posthearing brief to the judge identified the issue in the case as "whether Respondent's skycap Greenidge was discharged because he engaged in protected concerted activity when he raised concerns to his direct supervisor in front of his coworkers about the possibility that he and his coworkers would not receive tips for a job assignment" (GC's posthearing brief at 1). Indeed, the fact section of the General Counsel's posthearing brief does not even mention that the skycaps walked away from the van.[16]

Turning to the remark itself—"[w]e did a similar job a year prior and we didn't receive a tip for it"—and view-

[8] *Meyers II*, 281 NLRB at 886.
[9] Id.
[10] Id. at 887.
[11] *Prill v. NLRB*, 755 F.2d 941, 955 (D.C. Cir. 1985).
[12] *Meyers II*, 281 NLRB at 887.
[13] 330 F.2d 683 (3d Cir. 1964).
[14] Id. at 685.
[15] Id.; see also *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).
[16] We understand why the General Counsel might wish to avoid any suggestion that the skycaps' refusal to perform an assigned task constituted part of Greenidge's alleged protected concerted activity. Employees who "refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises" are engaged in an unprotected partial strike. *Audobon Health Care Center*, 268 NLRB 135, 136 (1983). Since the Respondent discharged Greenidge for what he said, not for what he did, we need not decide whether the skycaps engaged in an unprotected partial strike when they responded to Crawford's instruction to assist with the luggage in the arriving van by walking away.

ing the remark in light of the standards established in *Meyers II*, we easily find that Greenidge did not engage in concerted activity. First, the General Counsel does not contend that Greenidge was bringing a truly group complaint to the attention of management, and the record is devoid of evidence of "group activities" upon which to base a finding that Greenidge was doing so.[17] There is no evidence that the tipping habits of soccer players (or anyone else) had been a topic of conversation among the skycaps prior to Greenidge's statement. Neither does Greenidge's use of the word "we" supply the missing "group activities" evidence: it shows only that the skycaps had worked as a group and been "stiffed" as a group, not that they had discussed the incident among themselves. Second, the statement in and of itself does not demonstrate that Greenidge was seeking to initiate or induce group action, and the record contains direct evidence to the contrary. At the hearing, Greenidge testified that his remark was "just a comment" and was not aimed at changing the Respondent's policies or practices (Tr. 75), and the judge credited Greenidge's testimony in this regard, finding that the remark "was simply an offhand gripe about [Greenidge's] belief that French soccer players were poor tippers."[18] Where a statement looks forward to no action at all, it is more than likely mere griping,[19] and we find as much here. Accordingly, *Meyers II* compels affirmance of the judge's finding that Greenidge did not engage in concerted activity.

Nonetheless, counsel for the General Counsel excepts to the judge's finding, contending that Greenidge's comment qualifies as concerted activity because Greenidge made it "in a group setting . . . in the presence of his coworkers and Crawford" and used the first-person plural pronoun "we." Counsel cites, as applicable precedent, *Whittaker Corp.*, supra; *Chromalloy Gas Turbine Corp.*, supra; and *WorldMark by Wyndham*, supra. As explained below, *Whittaker Corp.* and *Chromalloy Gas Turbine* do not remotely resemble the instant case, and *WorldMark by Wyndham* is also distinguishable.

In *Whittaker*, the respondent's president, Miller, convened a series of employee meetings to announce that there would be no annual wage increase that year, contrary to the respondent's usual practice. At one such meeting, Miller invited questions, and employee Johnston stated: "Well, I don't remember us being called together when there's been a good year and saying here's something extra. But now that there's a little downturn, I feel we're being asked to bear the brunt of it by not having an increase."[20] The Board stated that "in a group-meeting context, a concerted objective *may* be inferred from the circumstances"[21] (emphasis added), and the Board relied on several circumstances in finding Johnston's statement concerted: (i) Johnston protested the denial of a wage increase; (ii) Johnston spoke up at an employee meeting convened specifically to announce the denial of the increase; (iii) the denial of the increase affected all the employees; (iv) the meeting was the first opportunity employees had to comment on or protest the denial of the increase, and Johnston had not had a chance to meet with other employees beforehand.[22] "In light of all the circumstances," the Board concluded, an objective to initiate or induce group action should be "inferred."[23]

Similarly, in *Chromalloy Gas Turbine*, the respondent's president, Paul Pace, held a series of meetings to announce a predictably unpopular change. Previously, employees were given a 15-minute morning break, but they were also free to leave their work area whenever

[17] *Meyers II*, 281 NLRB at 886, 887.

[18] The dissent claims that our reliance on Greenidge's credited testimony that his remark was "just a comment" to find that Greenidge did not seek to initiate or induce group action is "misplaced" because the applicable standard is objective, citing *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), and *Citizens Investment Services Corp.*, 342 NLRB 316 (2004) (*CIS*), enfd. 430 F.3d 1195 (D.C. Cir. 2005). These cases do not contradict our finding. In *Fresh & Easy*, the Board stated: "'Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.'" 361 NLRB at 153 (quoting *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993)). In other words, the *reason why* an employee seeks to initiate, induce, or prepare for group action—whether altruistic or selfish—is irrelevant, and in that sense, the standard is objective. But it is *not* irrelevant whether the employee does in fact seek to initiate, induce, or prepare for group action. Indeed, that is the standard announced in *Meyers II* itself. In *CIS*, abundant evidence established that employee Hayward made multiple statements, on multiple occasions, that brought truly group complaints to the attention of management. The judge relied on this evidence, and he also relied on Hayward's belief that he was acting on behalf of the group. The *CIS* majority disavowed the latter reliance. 342 NLRB at 316 fn. 2. In doing so, the majority correctly recognized that the issue was not what Hayward *believed* he was doing, but what, in fact, he *was* doing. So also here: what, in fact, was Greenidge doing when he made the statement at issue? Unlike in *CIS*, it was not at all apparent from his statement—a terse, truculent complaint about stingy soccer players—that he had a concerted objective, and the record contains direct evidence that he did not. In this context, we appropriately rely on this direct evidence confirming that Greenidge was not seeking to initiate group action.

Seeking to discredit our analysis, the dissent constructs a hypothetical, but her imagined scenario is inapposite. Our colleague posits a scene in which an employer announces a pay cut at a mandatory staff meeting, and an employee says, "We should do something about this!" and then later testifies that he did not intend the ensuing strike. In that scenario, however, the statement itself clearly evidences a concerted objective under *Meyers Industries*. As explained above, Greenidge's statement did not.

[19] *Mushroom Transportation*, 330 F.2d at 685.

[20] 289 NLRB at 933.

[21] Id. at 934.

[22] Id.

[23] Id.

they wanted throughout the day to get coffee from a vending machine. At the meetings, Pace announced that the single 15-minute break would be replaced by two 10-minute breaks—but employees were no longer free to visit the coffee machine outside of breaktime. The meeting attended by employee Diane Baldessari, a programmer, played out as follows. When Pace announced the change, Baldessari asked if employees would be written up if they were caught going for coffee at other times. Pace replied that they would be. Baldessari asked if the new policy would apply to the office employees. Pace asked if she would like it to, and Baldessari responded affirmatively, stating that it would be nice if things were fair for a change. Baldessari then asked Pace whether the new break policy was a way of punishing workers for their scrap rate[24] and downtime. Pace asked what Baldessari meant. She responded that Pace was taking things away from workers who have no control over the work and when it is given to them. She added that the managers schedule the work, and if they don't schedule it properly, it is not the workers' fault if they don't have work to do.[25] In finding Baldessari's statements to Pace to be concerted activity, the Board observed that Baldessari, a programmer, did not raise "purely personal concerns" but rather "espoused the cause of the hourly shop employees" and sought to have the new break policy applied "fair[ly] to all employees."[26] The Board also relied on the group-meeting setting—repeating language from *Whittaker* that in such as setting, "'a concerted objective may be inferred from the circumstances'"[27]—and the fact that, as in *Whittaker*, the meeting was called to announce a change in employment terms and conditions and provided the "first opportunity to protest the employer's proposed changes."[28] Accordingly, in *Chromalloy Gas Turbine* as in *Whittaker*, the Board inferred from all the circumstances an objective to initiate or induce group action.

Contrast the instant case. Here, there was no meeting, no announcement by management regarding wages, hours, or other terms and conditions of employment, and absent such an announcement, no protest that, under the totality of the circumstances, would support an inference that an individual employee was seeking to initiate or induce group action. Instead, there was a brief encounter between a supervisor and his supervisees, the giving by that supervisor of a work assignment, and a gripe about the assignment by an employee who subsequently disclaimed any object of initiating or inducing group action by testifying that his remark was "just a comment." Such is not concerted activity under *Meyers Industries*, *Whittaker*, or *Chromalloy Gas Turbine*.

In *WorldMark by Wyndham*, which the General Counsel also cites, a Board majority, relying on *Whittaker* and *Chromalloy Gas Turbine*, found that salesman Gerald Foley engaged in concerted activity when Vice President of In-House Sales Rodney Hill approached Foley in the sales room and mentioned to him a recently implemented change in the dress code that required employees to tuck in their shirts,[29] and Foley responded by asking Hill a few questions about the change (but did not challenge or protest it) while several employees gathered around.[30] Although the impromptu gathering and exchange in *WorldMark* bear only the faintest resemblance to the formally convened meetings and protests in *Whittaker* and *Chromalloy Gas Turbine*, one may at least trace in the encounter between Foley and Hill the outline of *something* like a meeting and possibly a *prelude* to a protest over an unwanted dress code change (which did happen soon thereafter, although it was not a group protest). Here, by contrast, a supervisor made a work assignment, Greenidge grumbled about it, and that is all. Thus, *WorldMark by Wyndham* is also distinguishable.[31]

[24] The respondent in *Chromalloy Gas Turbine* manufactured aircraft parts.

[25] 331 NLRB at 859.

[26] Id. at 863.

[27] Id. (quoting *Whittaker*, 289 NLRB at 934).

[28] Id.

[29] Many of the salesmen in *WorldMark* wore "Tommy Bahama" shirts, which are designed to be worn untucked. Foley was wearing a Tommy Bahama shirt, untucked.

[30] Foley had just returned from a brief vacation, during which he had heard a rumor about the dress-code change. *WorldMark by Wyndham*, 356 NLRB at 773 & fn. 14. When Hill noticed that Foley's shirt was untucked, he said, "We have a new rule, shirt tails have to be tucked in." Id. at 774. Foley asked if this was true, and Hill said it was. Foley asked whether this was a company-wide policy or "is it just us?" and, if it was company-wide, why it had not been posted. Hill asked Foley why he wanted everything to be in writing, and Foley responded that in companies such as Wyndham, "any time they have changes, we always see a memo." Id. at 765, 779. At that point, a second employee interrupted, stating, "I might not want to tuck in my shirt," "I didn't sign up for this crap," and "I don't need the money." Id. at 765.

[31] The dissent stretches to characterize the fleeting encounter between Greenidge and Crawford as an "impromptu gathering." She does so to align this case with *WorldMark by Wyndham*, where the Board similarly stretched to align the impromptu gathering of employees around Foley and Hill with the formally convened employee meetings in *Whittaker* and *Chromalloy Gas Turbine*—cases that, properly understood, are at the line separating concerted from individual activity. Our colleague implies a design on our part to cut Sec. 7 protections down to nothing. The accusation is false, but ironically, the converse appears to be true of her: in cases such as this, she would seemingly reduce to nothing the distinction between Sec. 7–protected group action and purely individual work-related complaints, deeming the latter concerted activity whenever made in the presence of other employees. (She acknowledges that the category "concerted activity" has boundaries, but it is noteworthy that neither of the cases she cites as outside that category involved the fact pattern at issue here: a complaint made to

But even assuming the facts of this case bring it within the scope of *WorldMark*'s holding, we conclude that *WorldMark by Wyndham* cannot be reconciled with *Meyers Industries* and must be overruled.[32]

Again, the governing standard for determining whether an individual employee has engaged in concerted activity is that set forth in *Meyers II*. In *Meyers II*, the Board held that the definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action" or where individual employees bring "truly group complaints to the attention of management."[33] As to the latter, the *Meyers II* Board required "record evidence [that] demonstrates group activities"[34] in order to find that an individually urged complaint is a truly group complaint. And the Board in *Meyers II* also held that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence."[35]

Whittaker Corp. tested the limits of the *Meyers II* standard, but the Board's decision in *Whittaker* remained within those limits. In *Whittaker*, the Board stated that "in a group-meeting context, a concerted objective *may* be inferred from the circumstances,"[36] and it carefully evaluated the circumstances surrounding employee Johnston's statement before determining, "[i]n light of all the circumstances," that the statement was "the initiation of group action as contemplated by the *Mushroom Transportation* line of cases which was specifically endorsed by *Meyers II*."[37] In other words, the Board in *Whittaker* treated the question of whether an individual employee had engaged in concerted activity as "a factual one based on the totality of the record evidence," as *Meyers II* dictates.[38]

So also, in *Chromalloy Gas Turbine*, the Board repeated that "'in a group meeting context, a concerted objective *may* be inferred from the circumstances,'"[39] and the Board drew such an inference based on several circumstances, including that (i) employee Baldessari did not raise "purely personal concerns" but rather "espoused the cause of the hourly shop employees"; (ii) Baldessari sought to have the new break policy applied "fair[ly] to all employees"; (iii) Baldessari made her statements in a group-meeting setting, the meeting was called to announce a predictably unpopular change in terms and conditions of employment, and the meeting was the "first opportunity to protest the employer's proposed changes."[40] Thus, in *Chromalloy Gas Turbine* as in *Whittaker*, the Board treated the question of whether an individual employee had engaged in concerted activity as "a factual one based on the totality of the record evidence," in accordance with *Meyers II*.[41]

In *WorldMark by Wyndham*, however, the Board broke from *Whittaker* and *Chromalloy Gas Turbine* and unmoored itself from *Meyers Industries*, in two respects. First, whereas in *Meyers II* the Board treated the question of whether an individual employee has engaged in concerted activity as "a factual one based on the totality of the record evidence," in *WorldMark* the majority announced, as a rule of law, that "an employee who protests publicly in a group meeting *is* engaged in initiating group action."[42] *WorldMark*'s second deviation from

management by a single employee in the presence of coworkers. See *Lutheran Social Service of Minnesota, Inc.*, 250 NLRB 35, 41 (1980); *Yuker Const. Co.*, 335 NLRB 1072, 1080 (2001)).

[32] Repeating a now-familiar refrain, the dissent charges us with "procedural overreach" in overruling *WorldMark by Wyndham*. We reject the charge. Counsel for the General Counsel relies on that decision in her exceptions brief, and assessment of her argument may properly include determining whether the precedent the argument relies on is sound. To the extent our colleague suggests that precedent cannot be overruled unless a party asks us to do so, we disagree. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (stating that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law").

[33] 281 NLRB at 887.

[34] Id. at 886.

[35] Id.

[36] 289 NLRB at 934 (emphasis added).

[37] Id. The Board wrote:

> Here, the Respondent's president called together the employees to announce that their anticipated wage increases would not be forthcoming. As these meetings provided the employees with their first knowledge of the Respondent's decision to suspend the wage increases, they were also the employees' first opportunity to comment on or protest that action. Johnston, not having had a chance to meet with any employee beforehand, made his statements as a spontaneous reaction to the Respondent's announcement. He phrased his remarks not as a personal complaint, but in terms of "us" and "we." Obviously, they were addressed to everyone assembled to discuss the topic of the proposed wage increase suspension, including his fellow employees. His statements implicitly elicited support from his fellow employees against the announced change. [¶] We find that, in the presence of other employees, Johnston protested, at the earliest opportunity, a change in an employment term affecting all employees just announced by the Respondent at that meeting. This is clearly the initiation of group action as contemplated by the *Mushroom Transportation* line of cases which was specifically endorsed by *Meyers II*.

Id.

[38] 281 NLRB at 886.

[39] *Chromalloy Gas Turbine*, 331 NLRB at 863 (quoting *Whittaker Corp.*, 289 NLRB at 934) (emphasis added).

[40] Id.

[41] 281 NLRB at 886.

[42] *WorldMark by Wyndham*, 356 NLRB at 766 (emphasis added). As authority for this proposition, the *WorldMark* majority cited *Cibao Meat Products*, 338 NLRB 934 (2003), enfd. mem. 84 Fed. Appx. 155 (2d Cir. 2004), cert. denied 543 U.S. 986 (2004). In *Cibao Meat Products*, the employer convened an employee meeting for the purpose of announcing a new requirement that employees help open the plant gate

Meyers flows from the first. By holding that any employee who complains in a group setting is engaged in concerted activity per se, the Board in *WorldMark* broke with the *Meyers I* definition of concerted activity—specifically, that to be concerted, activity must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[43] Some complaints—*many* complaints—voiced by individual employees in a group setting are spoken "by and on behalf of the employee himself [or herself]." If every complaint voiced by an individual employee in a group setting is concerted activity per se, as *WorldMark* holds, then some complaints—*many* complaints—voiced in a group setting will be deemed concerted activity even though they are spoken by and on behalf of the employee him- or herself, contrary to the central holding of *Meyers I*. Thus, we agree with the criticisms leveled against *WorldMark* by former Member Hayes in his dissenting opinion: the majority's decision in *WorldMark* "impermissibly conflat[ed] the concepts of group setting and group complaints" and "reduce[d] to meaninglessness the *Meyers* distinction between unprotected individual activity and protected concerted activity."[44]

Accordingly, *WorldMark by Wyndham* must be, and is, overruled. In doing so, we reaffirm the standards articulated in *Meyers I* and *II*, under which individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun. The fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity. Rather, to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action. Consistent with *Whittaker* and *Chromalloy Gas Turbine*, relevant factors that would tend to support drawing such an inference include that (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely (as in *WorldMark*) to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.[45]

in the morning before they start work. In response, employee Mendez stated "that it was not his job to open the gate, it was security's job," and that "we are the workers, the employees, after you open the factory." In determining whether this statement was concerted activity, the Board stated: "[A]n employee . . . who protests, in the presence of other employees, a change in an employment term affecting all employees just announced by the employer at an employee meeting, is engaged in the 'initiation of group action as contemplated by the *Mushroom Transportation* line of cases . . . .'" Id. at 934 (quoting *Whittaker Corp.*, 289 NLRB at 934). In *WorldMark*, this appropriately nuanced statement was telescoped into a rule that "an employee who protests publicly in a group meeting is engaged in initiating group action" per se. 356 NLRB at 766. Moreover, in *Cibao Meat Products*, the Board repeated—and italicized for emphasis—the statement from *Whittaker* that "'*in a group-meeting context, a concerted objective may be inferred from the circumstances*,'" 338 NLRB at 934 (quoting *Whittaker*, 289 NLRB at 934) (emphasis in *Cibao Meat Products*)—a statement the *WorldMark* majority omitted from its decision, which effectively replaced "may be inferred" with "must be inferred." Accordingly, *Cibao Meat Products* is consistent with *Whittaker* and *Chromalloy Gas Turbine* (and *Meyers*), the *WorldMark* majority's distorted and distorting reliance on that case for its erroneous per se rule notwithstanding.

[43] *Meyers I*, 268 NLRB at 497.

[44] *WorldMark by Wyndham*, 356 NLRB at 768 (Member Hayes, dissenting). The dissent points out that the *WorldMark* Board discussed the circumstances surrounding employee Foley's comments, and she says we have taken certain language in *WorldMark* out of context. But the fact remains that this language—the categorical declaration that "an employee who protests publicly in a group meeting is engaged in initiating group action"—opened the door for the Board to ignore the totality of the circumstances in future cases, contrary to *Meyers*. We close that door today.

[45] We do not hold that all these factors *must* be present to support a reasonable inference that an employee is seeking to initiate or induce group action. In keeping with *Meyers II*, the determination of whether an individual employee has engaged in concerted activity remains a factual one based on the totality of the record evidence.

The dissent's alarmist response to the factors set forth above, and her claim that they reflect an "unduly cramped" view of concerted activity, warrants stepping back a moment and taking a more comprehensive view of the context within which this case fits. We are not addressing here the heartland of concerted activity—instances where an employee acts *with* other employees or on their behalf as their authorized representative. We are also not presented here with a situation in which an employee, although not expressly authorized to do so, brings a truly group complaint to the attention of management. And we are not concerned here with an employee who addresses one or more coworkers with the object of initiating, inducing, or preparing for group action. Rather, we are dealing with a situation in which an individual employee speaks to management, not to bring a group complaint to management's attention, but the encounter takes place in the presence of other employees. This is a borderline scenario. In such a scenario (although not on the record here), the evidence *may* warrant drawing an inference of a concerted objective, but there is also a substantial risk (in former Member Hayes' apt phrasing) of "impermissibly conflat[ing] the concepts of group setting and group complaints" and "reduc[ing] to meaninglessness the *Meyers* distinction between unprotected individual

Of course, other evidence that a statement made in the presence of coworkers was made to initiate, induce or prepare for group action—such as an express call for employees to act collectively—would also support a finding of concertedness under *Meyers II*.

B. Greenidge's Comment Was Not for the Purpose of Mutual Aid or Protection.

To warrant protection under Section 7, activity must be both concerted *and* undertaken for the purpose of mutual aid or protection. Having found that Greenidge did not engage in concerted activity, our analysis may stop here.[46] But even if Greenidge's remark about soccer players' tipping habits qualifies as concerted activity, we find that Greenidge did not make it for the purpose of mutual aid or protection, and therefore the remark still would have been unprotected.

The judge found that Greenidge's statement concerning customers' tipping habits "did not relate to the skycap's wages, hours, or other terms and conditions of employment." Taking the judge's finding as he intended it—i.e., that tips given to the skycaps by airline passengers are not wages received from, and controlled by, the Respondent—we agree.[47] The amount of a tip given by an airline passenger to the skycap handling his or her luggage at curbside is a matter between the passenger and the skycap, from which the skycap's employer is essentially detached, see *Universal Syndications, Inc.*, 347 NLRB 624, 630–631 (2006), and the dissent cites no case in which the Board has ever held that a statement about a tip within a client's, patron's, or customer's sole discretion comes within the scope of the "mutual aid or protection" clause.[48] Neither was Greenidge's statement aimed at improving the skycaps' lot as employees through channels outside the immediate employee-employer relationship, i.e., through recourse to an administrative, legislative, or judicial forum. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). Thus, the statement did not have mutual aid or protection as its purpose.

Moreover, despite Greenidge's understandable resentment at having received no tip for a time-consuming job the previous year, there is no evidence that he was dissat-

activity and protected concerted activity." *WorldMark*, 356 NLRB at 768 (Member Hayes, dissenting). Thus, to mitigate that risk, make analysis of these borderline cases more predictable, and furnish guidance to the regulated community, we have drawn certain factors from settled precedent we reaffirm today, *Whittaker Corp.* and *Chromalloy Gas Turbine*, while also making clear that they are *factors*, not necessary elements, and that the concertedness determination remains a factual one based on the totality of the evidence. In short, our colleague's alarmist rhetoric may be colorful, but it is unfounded.

We have rejected our colleague's false suggestion that we would interpret Sec. 7 "down to nothing." See fn. 31, supra. To the contrary, we could not agree more with her declaration that "Sec. 7 rights are the core of the Act." Those rights should be protected to the full extent Congress intended. Precisely for this reason, the term "concerted activity" should mean something. Consistent with the Act and *Meyers Industries*, our decision today returns Board precedent to a meaningful standard for determining whether an employee who addresses management about a workplace matter in the presence of other employees is engaged in protected concerted activity, or individual activity outside the scope of Sec. 7 protection.

[46] See *Meyers I*, 268 NLRB at 494 ("[T]he statute requires that the activities in question be 'concerted' before they can be 'protected.'").

[47] *The Capital Times Company*, 223 NLRB 651 (1976), cited by the dissent, is not to the contrary. There, the Board stated that for purposes of determining the scope of the duty to bargain under Sec. 8(d), the statutory term "wages" includes tips. Id. at 652. Thus, if tipped employees are represented by a union, their employer must bargain on request over matters related to tips, such as tip-pooling and tip-sharing. See fn. 49, infra. But *Capital Times* does not change the fact that customers furnish tips, not employers, or that arriving airline passengers, and they alone, decide whether to tip the skycap and, if so, how much, as Greenidge testified. See, e.g., Tr. 50 ("[S]ome people give you $5, some give you 20. It depends. . . . We take whatever we get, sir."); Tr. 59 ("[E]ach individual gets their own tips from each customer that it helps."); Tr. 74 ("Many times we didn't get a tip . . . .").

The dissent also cites *Nellis Cab Co.*, 362 NLRB 1587 (2015), but our colleague's own discussion of that case shows that it is distinguishable from this one. In *Nellis Cab*, Las Vegas taxicab drivers staged an extended break to protest the potential issuance of additional taxicab medallions by the Las Vegas Taxicab Authority—a move that would have put more taxicabs on the street, which would have meant less income for individual drivers. The Board found the extended break to be protected concerted activity, even though the Taxicab Authority controlled the decision whether or not to issue more medallions, because the employer played a role in that decision. The Board stated that "the taxicab companies obviously could be expected and did seek to influence Taxicab Authority's decision (for example, at [a] . . . meeting of the Taxicab Authority, where representatives of taxicab companies spoke in favor of issuing more medallions)." Id., slip op. at 2. Here, in contrast, the Respondent had no mechanism for, or history of, exerting pressure on airline passengers to provide skycaps more generous tips—or, indeed, any tips at all.

The dissent claims that the Respondent did have some control over tips, citing as evidence that "the skycaps' protest prompted their supervisor to relay their concerns to managers of the airline terminal." Here our colleague either distorts the record or strays from the General Counsel's theory of the case. Greenidge's remark did not prompt Crawford to mention the tip issue to the terminal manager. Crawford mentioned the issue after the terminal manager questioned him, and the terminal manager questioned Crawford when she saw the skycaps walk away. But perhaps by "the skycaps' protest," the dissent *means* their act of walking away. In that case, she abandons the General Counsel's theory of the case, which is that Greenidge's remark alone constitutes the allegedly protected concerted activity at issue here. The dissent says that we miss her point, which is that "an employer has the means to address employee concerns over poor tips." In certain settings, that may be true. For example, a restaurant can slap a mandatory tip surcharge on every bill, and some do. But that is a very different setting than the one we are dealing with here.

[48] Thus, the situation here is unlike that in cases where the employer did exert some control over tip-related matters through tip-pooling or tip-sharing arrangements. See, e.g., *Thalassa Restaurant*, 356 NLRB 1000, 1016 (2011); *Edward's Restaurant*, 305 NLRB 1097, 1098 (1992), enfd. 983 F.2d 1068 (6th Cir. 1992); *Fairmont Hotel Co.*, 230 NLRB 874, 878 (1977); *Top of Waikiki, Inc.*, 176 NLRB 76, 79 (1969), 429 F.2d 419 (9th Cir. 1970).

isfied with the existing tipping arrangements or wanted them to be modified. Indeed, the evidence is to the contrary. Greenidge testified that the tips he receives "help[] to make a good bit of change," as much as $150 a day (Tr. 31). And, as stated previously, Greenidge testified that the remark at issue here was "just a comment" and was not aimed at changing the Respondent's policies or practices. Thus, the evidence does not support a finding that Greenidge was seeking "to improve terms and conditions of employment." *Eastex*, supra at 565.[49]

We correct the judge's decision in one respect, however. The judge found that the fact that Greenidge could not have reasonably expected his gripe might affect the terms or conditions of his employment, supported his finding that Greenidge did not engage in concerted activity. That is incorrect. Rather, this fact supports finding that Greenidge's gripe about the tipping habits of soccer players—even assuming it constituted concerted activity—was not for the purpose of mutual aid or protection. See *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981) (per curiam).

Accordingly, because the conduct for which Greenidge was discharged was not protected concerted activity, the Respondent did not violate Section 8(a)(1) of the Act by discharging him.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. January 11, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Under well-established principles set forth in Section 7 of the National Labor Relations Act, which grants employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection,"[1] the Board should have no difficulty finding that the Respondent unlawfully discharged one of its skycaps, Trevor Greenidge, for complaining about the lack of tips.

When the Respondent called upon Greenidge and his fellow skycaps to transport an arriving soccer team's equipment, Greenidge objected to his supervisor that the skycaps had not been tipped for a similar job the previous year. Greenidge lodged this protest in front of his fellow skycaps, who naturally had a mutual interest in his concern because they would be sharing the tip, if any, given by the team. Greenidge's complaint prompted the supervisor to assure the skycaps that he could and would raise the tipping concern with the airline and terminal managers. Following this complaint, the skycaps initially refused to attend to the team, but, a short time later, after baggage handlers were brought in to help with the team's bags, the skycaps did assist the team as requested. The Respondent nevertheless discharged Greenidge, noting expressly that he had raised the tipping concern "in front of the other skycaps."

In those circumstances, longstanding Board and court precedent compels a finding that Greenidge's complaint constituted an attempt to initiate a group objection over tips, and that he was thus engaged in concerted activity for the mutual aid and protection of his fellow skycaps—conduct for which he could not lawfully be fired. Instead, the majority upholds Greenidge's discharge, misreading and overruling (without being asked) a recent Board decision and imposing sharp new restrictions (unsupported by precedent) on what counts as "concerted" and "mutual aid or protection" for purposes of Section 7.

I.

The Respondent is a contractor that provides ground services at JFK International Airport. The Respondent directly paid its skycaps between $3.90 and $4.15 an hour. Most of the skycaps' compensation derived from customer tips, which varied in amount but sometimes totaled up to $150 per day.

[49] Our dissenting colleague's attempt to turn this case into a referendum on the protection of tipped employees is unfortunate. Nothing in our holding should be read as reducing the Act's protection for employees whose pay is in part comprised of tips. To the contrary, our decision today recognizes the importance of these workers in our economy and attempts to provide clearer guidance for them. Indeed, while the dissent's ever-expanding interpretation of what constitutes concerted activity would offer tipped employees a hollow victory by protecting individual griping about matters over which their employer has no control, our restoration of the *Meyers* standard makes clear that employees like Greenidge place themselves outside the Act's protection when they jeopardize customer relationships and attendant jobs through purely individual complaints.

[1] 29 U.S.C. §157.

On the evening of July 17, 2013, Trevor Greenidge, a skycap, was working with three other skycaps, Allan Wills, Terrence Boodram, and Basil Rodney. Cebon Crawford, one of the Respondent's supervisors, notified Greenidge and his coworkers that Lufthansa Airlines had requested four skycaps to transport sporting equipment and about 50 to 70 bags on behalf of a soccer team that would be arriving soon. After receiving this news, Greenidge said to Supervisor Crawford—and in front of the other skycaps who had been asked to help—"We did a similar job a year prior and we didn't receive a tip for it." Greenidge's implication was plain: the work being requested of the skycaps, who worked primarily for tips, might not be worth performing. Supervisor Crawford responded—with Greenidge's coworkers still present—that he would bring this concern to the airlines and terminal managers. Crawford thus understood the clear implication of Greenidge's statement (that a tip was expected, if the work were to be done) and promised to intercede.

Shortly thereafter, the soccer team's van arrived. Rather than immediately assist the team, the skycaps at first walked away—obviously because of the concern raised by Greenidge. While this was happening, Lufthansa's manager, Isabelle Roeder, asked why no one appeared willing to move the team's equipment and baggage. As he had said he would, Crawford then communicated the skycaps' demonstrated concerns, telling Roeder and Klaudia Fitzgerald, one of the terminal's managers,[2] that the skycaps did not want to move the equipment and bags because they did not think they would get an adequate tip. Crawford then requested that several baggage handlers attend to the team. Thereafter the skycaps returned and began assisting the team. Even with the skycaps' initial delay, the team's equipment and luggage was moved into the terminal in 12 minutes, and Lufthansa gave the skycaps an $83 group tip. Later that evening, and continuing the following morning, Fitzgerald and Ed Paquette, the terminal's managers, exchanged a series of emails about the incident with the Respondent's managers and Chief Operating Officer. One of the Respondent's managers, Deborah Traynor, reviewed video footage of the incident and opined in an email that "it was not the service provided but the lack of professionalism on [the skycaps'] part" that was at issue. Based on her investigation, Traynor advised terminal manager Paquette that the four skycaps would be removed from service, and accordingly Paquette requested their names in order ensure their removal from the terminal.

On July 19, Traynor provided letters to the four skycaps informing them that they were discharged.[3] In relevant part, Greenidge's discharge letter stated: "You were indifferent to the customer and verbally make [sic] comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [sic] in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa."[4]

In sum, then, when the Respondent called upon Greenidge and his coworkers to transport the soccer team's equipment and bags, Greenidge objected to Supervisor Crawford that the team had not tipped the skycaps the previous year. Greenidge raised this concern in front of his fellow skycaps, who naturally had an interest in the matter because they would be sharing the tip, if any, given by the team. In response, Crawford assured Greenidge—still in front of the other skycaps—that he, Crawford, could and would raise this concern with the airline and terminal managers. Not satisfied with this response, Greenidge and his coworkers, together, initially refused to attend to the team. But after baggage handlers were called in to assist with the team's bags, the skycaps, again together, also proceeded to assist the team with its equipment and bags. The Respondent nevertheless discharged Greenidge, noting expressly in the discharge letter that Greenidge had raised the tipping concern "in front of the other skycaps."[5] As I will explain, on these facts and under well-established law, the majority's conclusion that Greenidge was not engaged in concerted activity for the mutual aid and protection of the skycaps is plainly wrong.

[2] As a manager of the terminal, Fitzgerald was not employed by the Respondent.

[3] All four skycaps filed grievances over their discharges with Local 660, United Workers of America, which was their collective-bargaining representative at that time. The other skycaps were offered positions with one of the Respondent's affiliate companies, but Greenidge was not.

[4] This was not entirely factually correct. As the majority's factual recitation lays out, Greenridge's remark was made in front of Crawford (his supervisor) and his fellow employees, but representatives from Lufthansa and Terminal One were not yet present.

[5] As noted above, the letter also mentioned that the comment was made in front of a terminal manager and the manager from Lufthansa, but that was not correct. While the majority places great emphasis on the importance of the Respondent's ability to preserve its customer relations, it is plain on these facts that Greenridge's *comment*—which was not made in front of customers—was key to his discharge, as was the fact that the comment was made in front of *coworkers* and that the Respondent clearly perceived it as instigating them to act in response. Indeed, the centrality of Greenridge's comment to his ultimate termination is further suggested by the fact that the three other skycaps who refused to serve the customer were all subsequently offered positions with one of the Respondent's other affiliated companies, while Greenridge was not.

II.

Section 7 of the Act establishes the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," and Section 8(a)(1), in turn, makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[6] "To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152 (2014). In assessing these elements, the Board applies an objective standard, putting aside an employee's subjective intentions.[7] In this case, Greenidge's statement to Crawford satisfied both the objective "concerted" and "mutual aid or protection" requirements under established Board precedent.

A.

Greenidge's remark falls easily into the category of concerted activity for two independent reasons. First, the surrounding circumstances make clear that, to any reasonable observer, Greenidge's remark would have appeared as intended to initiate a group objection by the skycaps regarding their tips. Second, the Respondent here regarded Greenidge's comment, for which it discharged him, as concerted—as intended to induce group action.

1.

In *Meyers Industries*, the Board elaborated the elements of concerted activity. It held that an employee's activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[8] Subsequently the Board clarified its *Meyers I* decision to definitively hold that concerted activity under Section 7 "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action."[9] Notably, the "object of inducing group action need not be express," and an employee's statement may, in certain contexts, "implicitly elicit[] support from his fellow employees."[10]

Here, the evidence, taken as a whole, establishes that Greenidge's statement was objectively intended to induce group action. Greenidge's comment that "[w]e did a similar job a year prior and we didn't receive a tip for it," expressed a concern about the tipping practices of the soccer team that was a matter of natural and immediate interest not just to Greenidge, but also to his coworkers. All of them were about to be asked to handle the team's many bags, and all of them worked primarily for tips—in this particular instance a "group" tip to be shared among themselves. Thus, there clearly was the potential for common cause among a "speaker" employee (Greenidge) and "listener" employees (the other skycaps), which the Board has held supports an inference of concerted intent.[11] Further, although not necessary to drawing an inference of an intent to induce group action, such an inference is further strengthened by the fact that Greenidge clearly was referring to more than an individual interest, as demonstrated by both his statement that *"we* didn't receive a tip," referring to the skycaps involved in the prior incident, and his voicing of this concern in front of the skycaps who were being asked to help—and who also faced the prospect of not being tipped for a larger than usual assignment. Under Board and judicial precedent, these facts strongly support a finding that Greenidge sought to initiate or induce group action.[12]

The events immediately following Greenidge's statement confirm that his statement objectively sought to induce or initiate group action: right after his comment, the skycaps initially refrained from assisting the soccer team with their equipment. It is unclear how else his coworkers got the message to walk away from the soccer team's equipment *other than by understanding Greenidge's comment as urging them to do so.* Objectively, then, Greenidge's comment was aimed at inducing a

[6] 29 U.S.C. §§ 157, 158(a)(1),

[7] See id., 361 NLRB at 153 (holding that "both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard," and "[a]n employee's subjective motive for taking action is not relevant to whether that action was concerted"). See *Citizens Investment Services Corp.*, 342 NLRB 316, 316 fn. 2 (2004) (rejecting reliance on employee's subjective belief that he was acting on behalf of others and observing that "only the *objective* evidence in the record establishing that [the employee's] actions constituted concerted activity . . . may be considered"), 430 F.3d 1195 (D.C. Cir. 2005).

[8] 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[9] *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("[I]nasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.").

[10] *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988).

[11] See *Fresh & Easy*, supra, 361 NLRB at 154 fn. 10.

[12] See *NLRB v. Henry Colder Co.*, 907 F.2d 765, 768 (7th Cir. 1990) (use of pronoun "we" supports inference that employee "directed his complaints primarily on behalf of the sales force"); *Chromalloy Gas Turbine Group*, 331 NLRB 858, 863 (2000) ("the objective of initiating . . . or . . . inducing group action . . .' may be inferred from the context of the group meeting where the comments are made").

group objection to poor tips.[13] Although the issue of whether the skycaps' delay in moving the team's equipment was not separately alleged by the General Counsel to be concerted activity (because Greenidge's comment substantially motivated his discharge), the delay, like all other contextual evidence, certainly sheds light on how an objective observer would have interpreted the purpose of Greenidge's comment.

Further, the Respondent itself—in contrast to the majority—recognized and regarded Greenidge's comment as seeking to induce group action. The Respondent's perception that the comment was concerted activity is both further evidence that a reasonable objective observer would perceive it to be so, and—as the General Counsel alleged—an independent basis for finding Greenidge's discharge unlawful.[14] The Respondent's termination letter to Greenidge stated, "You were indifferent to the customer and verbally make [sic] comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [sic] in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa." This letter made special note of the fact that Greenidge made his comments about tips "in front of other skycaps"—coworkers who might be expected to follow Greenidge's lead, as they indeed did. Significantly, the Respondent's substantially identical discharge letters to two of those skycaps (Terrence Boodram and Allan Wills) likewise relied on the fact that the employees spoke out or acted "in front of other skycaps." Further, the Respondent's discharge letter to Boodram expressly referenced the report about "some conversion [sic] about no tip or small tip for the job," thereby directly linking Boodram's actions to Greenidge's protest to Supervisor Crawford.[15] The Respondent thus clearly did not view Greenidge's comment as a mere personal gripe, but rather recognized it as a statement inviting other skycaps to protest as well. Last, the record establishes that the Respondent actually treated the skycaps as a group in discharging them all; Traynor, following her investigation, notified Paquette in a single email that all of the involved skycaps would be removed. The Respondent's obvious belief that Greenidge's protest had led to concerted activity is yet another, independent basis for finding his discharge unlawful.[16]

2.

In those circumstances, the majority's contrary view—that Greenidge's statement amounted to no more than an unprotected personal gripe—is wholly unpersuasive. As demonstrated, that view is belied by the facts. The majority's reliance on Greenidge's testimony that his statement to Crawford was "just a comment" is misplaced, because the testimony at most reflects a post hoc, subjective belief.[17]

In order *not* to find concerted activity here, the majority chooses, without any request by a party or invitation for briefing,[18] to unnecessarily overrule a recent Board

[13] Cf. *MCPc, Inc. v. NLRB*, 813 F.3d 475, 485 (3d Cir. 2016) (concluding that any doubt whether employee's statements qualified as concerted activity was dispelled by the fact that two other employees expressed their agreement when employee urged the employer to hire more engineers); *Henry Colder Co.*, supra, 907 F.2d at 767–768 (employee who spontaneously assumed leading role in protesting earlier starting time, prompting others to voice their objections, was engaged in concerted activity).

[14] The Board has held that discharges that are motivated by perceived concerted activity are unlawful on that basis alone, even when the employees have not, in fact, engaged in concerted activity. See, e.g., *Metropolitan Orthopedic Assn.*, 237 NLRB 427, 427 fn. 3 (1978) (employer unlawfully punished employee based on its belief that he engaged in protected concerted activity).

[15] The record apparently does not contain a discharge letter for the fourth skycap, Allan Wills.

[16] See *Metropolitan Orthopedic Assn.*, supra, 237 NLRB at 427 fn. 3; *Parexel International*, 356 NLRB 516, 519 (2011) (even if employee had not yet engaged in concerted activity, employer's discharge of that employee in order to preempt future concerted activity—"to 'nip it in the bud'"—was unlawful without more.").

[17] As explained, under Board law, the question is whether an employee's statement or actions would objectively tend to induce group action. See *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153; *Citizen's Investment*, supra, 342 NLRB at 316 fn. 2. Contrary to the majority's suggestion, it is not merely the employee's subjective feelings at the time (altruistic, selfish, or somewhere in between) that are irrelevant to the inquiry—it is also irrelevant whether the employee subjectively intended, in his own mind, to induce group action—what matters is if an objective observer would have perceived that intent.

A hypothetical case that turns on the issue of the employee's subjective belief illustrates where the majority's analysis errs. Imagine an employee who, at a mandatory staff meeting called by the employer to announce a pay cut, promptly says, "We should do something about this!" His coworkers react by announcing that they are going out on strike to protest the pay cut—and they do so lawfully. The employer fires only the employee who spoke out first, for inciting the strike. At his unemployment-compensation hearing, the employee testifies that he did not intend for his coworkers to walk out, that he had no idea what they could or should do to protest the pay cut, and that he spoke out impulsively. Consistent with Sec. 7 of the Act, could the Board possibly find (as the majority's holding here suggests) that the discharge of the employee was lawful because he had not subjectively intended to initiate or induce group action, regardless of how the employer and his coworkers all understood his statement? Just as the Act must protect employees whose efforts to initiate or induce group action *fail*, see *Mushroom Transportation*, supra, 330 F.2d at 685, so it must protect employees whose statements reasonably tend to result in group action, even if they did not subjectively intend it. Failing to protect employees in such circumstances obviously would chill the exercise of Sec. 7 rights, if not by the fired employee, then by his coworkers.

[18] This appears to be another example of procedural overreach by the majority. Yet again, the majority disregards adjudicative norms in order to make new law without giving the parties or the public any notice or opportunity to weigh in. See, e.g., *UPMC*, 365 NLRB No. 153, slip op. at 17 (2017) (Member McFerran, dissenting). Although my colleagues dismiss my "familiar refrain," I remain convinced that

decision, *WorldMark by Wyndham*,[19] and to improperly recast settled Board precedent. The majority purports to accept and apply the *Meyers I* and *II* lines of cases and their definition of concerted activity—which includes individual conduct intended to induce or initiate group action—but either casts aside or reinterprets those precedents. In their place, the majority adopts a checklist of factors that imposes significant, and unwarranted, restrictions on what counts as concerted activity.

The majority's decision to overrule *WorldMark*, which supports finding a violation here (but is hardly essential), is based on a fundamental misreading of its significance. In *WorldMark*, an employee spontaneously complained to a supervisor in front of other employees, one of whom then joined in the protest, about a change in his employer's dress code imposing a new requirement that employees tuck in their "Tommy Bahama" shirts, which traditionally were worn untucked. The Board found that the employee's protest was concerted, observing generally that the Board had consistently found activity concerted when, in front of their coworkers, single employees protest terms and conditions of employment common to all employees. Id. at 766. More specifically, looking at all of the attendant circumstances, the Board relied on the following facts: (1) the employee took the first opportunity to question the newly announced dress code change; (2) the dress code affected him and his coworkers as a group; (3) the employee presented his objection in group terms, using "we," not "I"; (4) the employee knew from past experience his coworkers preferred to wear their "Tommy Bahama" shirts untucked, and thus the employee would reasonably expect this issue to be a matter of concern to his coworkers; and (5) in fact, a coworker did join his protest. Id. The Board thus found concerted activity based on a thorough review of all the relevant facts and circumstances.

Nevertheless, the majority insists that *WorldMark* must be overruled because, the majority says, the *WorldMark* Board wrongly announced a per se rule that an employee's protest made in any group context is always a concerted inducement to group action. In particular, the majority finds it problematic that the employee in that case raised his objection in an impromptu gathering of employees, rather than in a formal employer-employee meeting, which the majority says is inconsistent with prior cases.[20] But there is no substance to either of these asserted concerns.

Contrary to the majority, the *WorldMark* Board manifestly did not establish a per se rule that concert is established where an employee's protest occurs in any group context. As described above, the Board plainly considered all the surrounding circumstances in finding that the employee's protest was an inducement to group action. Only by reading language out of context could *WorldMark* suggest a per se rule. But the decision as a whole clearly does not adopt or apply any such a rule.

Further, although *WorldMark* may not be factually identical to the precedents it cites, it is not inconsistent with them (as the majority suggests). Broadly speaking, *WorldMark* simply reflects the unremarkable truism that different cases almost invariably present different facts, and that a full analysis of the particular facts of each case may or may not lead to a finding of concerted activity. In that vein, drawing on earlier cases, the *WorldMark* Board merely reflected the Board's longstanding recognition that a complaint made in front of an audience of coworkers naturally is a relevant consideration that, in combination with other relevant facts, could lead to an inference of concerted activity.

Both *WorldMark* and the present case are fully consistent with these prior cases, as both involve a straightforward application of this longstanding consideration: a complaint made in front of a group, in combination with other circumstances, may support an inference of an inducement of group action, notwithstanding that the employee in *WorldMark,* and Greenidge in this case, made his protest during an impromptu gathering (rather than a formal meeting). In *Chromalloy Gas Turbine Group*, 331 NLRB 858 (2000), for example, the Board found that an individual employee's protest of a new break policy during an employer-initiated meeting to discuss the policy was concerted under all the circumstances, including that the change affected many employees and naturally would be of concern to them. To be sure, the Board also relied on the fact that the employee lodged her protest during a formal meeting about the policy, which often suggests intent to induce group action. But the Board clearly did not hold that concert may be found *only* in such meetings. Similarly, in *Whittaker Corp.*, 289 NLRB 933 (1988), the Board found that a lone employee engaged in concerted activity when he objected, in a formal employer-employee meeting, to the employer's announcement that employees would not be receiving their regular annual wage increase. As in *Chromalloy*,

the Board, the Act, and reasoned decision-making are all better served if we invite public participation in deciding important labor-law questions—as the Board used to do.

[19] 356 NLRB 765 (2011)

[20] See *Whittaker Corp.*, supra; *Chromalloy Gas Turbine Group*, supra; *Cibao Meat Products*, 338 NLRB 934 (2003), enfd. mem. 84 Fed. Appx. 155 (2d Cir. 2004).

the Board noted that, "[p]articularly in a group-meeting context, a concerted objective may be inferred from the circumstances." Id. at 934. But, again, the Board, quoting *Meyers* itself, was careful to emphasize that "'the question of whether an employee engaged in concerted activity is, at its heart, a factual one." Finally, in *Cibao Meat Products*, 338 NLRB 934 (2003), enfd. mem. 84 Fed. Appx. 155 (2d Cir. 2004), the Board again found concerted activity where an employee voiced his protest during an employer-called meeting, but once again the Board did not hold that the setting was determinative.

In sum, although in each of those cases the Board found that, "particularly in a group meeting," one might reasonably infer that a protest was intended to induce group action, the Board never held that asserting an objection during a formal meeting was either necessary or sufficient. Rather, in each case the Board conducted a thorough review of all the facts in finding concerted activity. That is precisely what the Board did in *WorldMark*, undermining the majority's asserted rationale today for overruling it. Notably, in a subsequent case, the U.S. Court of Appeals for the Third Circuit saw no need to interpret *WorldMark* as establishing a per se rule, instead observing in *MCPc, Inc.,* supra, 813 F.3d at 485, that the decision stands for the limited proposition that the mere fact a statement is made spontaneously in an informal setting does not foreclose a finding of concerted activity. This understanding of *WorldMark* is fully consistent with the *Meyers* decisions, where the Board emphasized that the definition of "concerted" given in those cases was "by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis." *Meyers II*, supra, 281 NLRB at 887 (citing *Meyers I*, supra,). As a result, there is no basis for the majority's conclusion that *WorldMark* must be overruled.

Worse yet, from its unwarranted reversal of *WorldMark*'s nonexistent per se rule, the majority pivots to announcing a new set of factors that threaten to substantially narrow the situations in which statements made by individual employees in front of their coworkers will be found concerted. Consistent with *Meyers*, the Board has always rejected the imposition of strict criteria that, while perhaps capturing some examples of concerted activity, nonetheless prove far too restrictive to properly delineate the boundaries of concerted conduct.[21] The sound policy reasons underlying that approach are clear. As the Board explained in *Meyers II*, one of the fundamental purposes of Congress's decision to protect "concerted" activities by employees was to "reduce the industrial unrest produced by the lack of appropriate channels for the collective efforts of employees to improve working conditions." 281 NLRB at 883. In order to fully realize that statutory goal, it is necessary to interpret "concerted" broadly; otherwise, the Act simply cannot do what Congress intended.[22]

The majority risks frustrating the full realization of that statutory objective by subordinating the fact-sensitive approach at the heart of a *Meyers* analysis to criteria that effectively establish a minimum threshold for finding that an employee's activity is concerted.[23] As the Third Circuit put it, in rejecting an employer's attempt to pick apart an employee's protest based on assertedly missing elements, the majority's factors "espouse an unduly cramped interpretation of concerted activity under [Section] 7—one that assesses concerted activity in terms of isolated points of conduct rather than the totality of the circumstances." *MCPc*, supra, 813 F.3d at 486.

It is not difficult to see, moreover, how the majority's "unduly cramped" factors are likely to exclude from protection what is concerted activity by any reasonable

[21] See, e.g., *Whittaker Corp.*, supra, 289 NLRB at 933–934 (rejecting requirement that the "object of inducing group action [be] express" and finding concerted an employee's "statement at the meeting implicitly elicited support from his fellow employees against the announced change"); *Fresh & Easy*, supra, 361 NLRB at 154 (no requirement that solicited coworkers actually join the protest in order to prove an intent to induce group action).

[22] I do not suggest, of course, that the concept of "concerted" activity has no boundaries. And, in fact, the Board has found in certain circumstances that an individual employee's conduct actually was "mere griping" or purely personal. See *Lutheran Social Service of Minnesota, Inc.*, 250 NLRB 35, 41 (1980) ("more than 3 months of behind-the-scenes dissatisfaction without any indication of an intention to cultivate it into some more confrontational form of expression," made clear that the conduct lacked any realistic aim at a group protest); *Yuker Construction Co.*, 335 NLRB 1072, 1080 (2001) (complaints exchanged between two employees which were not directed at management, and which implied no further protest nor concerted action to be taken, found not concerted).

[23] The majority states that the factors are not exhaustive. Yet, somewhat contradictorily, my colleagues expressly provide that not *all* of these factors must be present to find an inducement to group action—thus implying that *at least one factor must be present* and that situations not encompassed by these factors will not support an inference of concerted action. Further, my colleagues' application of these factors in the present case makes clear that the absence of any one of these factors will weigh against an inference of concerted intent. For example, my colleagues find that, with respect to Greenidge's comment, there "was no meeting, no announcement by management regarding wages, hours, or other terms and conditions of employment, and absent such an announcement, no protest that, under the totality of the circumstances, would support an inference that an individual was seeking to initiate or induce group action." In other words, the absence of these new criteria is dispositive, despite other circumstances supporting an inference of concert.

measure.[24] Take the majority's first factor: whether the statement occurred at a meeting called by the employer at which the policy being protested was newly announced. To be sure, that an employee has raised a matter at an official meeting might well *strengthen* an inference of the intent to induce group action. But, as Board and judicial decisions illustrate, employees also initiate protest through spontaneous, informal means that also deserve Section 7 protection.[25] Factor 3—which suggests that employee questions, as opposed to declarative protests, are less likely to be inducements of group action—suffers from the same obvious defect. Asking questions is frequently an indirect way of criticizing and drawing others to oppose a new policy.[26] Likewise, the majority's factor 5—which suggests that an intent to induce group action is absent if the employee previously had an opportunity to, but did not, discuss a matter with his coworkers—unnecessarily excludes the possibility that an employee might not jump at the first opportunity to protest, but instead might take or need time to work up the resolve to confront his employer about a matter of obvious mutual employee concern.

Applying the majority's factor-based test to Greenidge's case puts its severe limitations in stark relief. The majority ignores the overall picture that the facts in this case depict: spontaneous or not, Greenidge's statement indicated an objective intent to induce group action. As described, prompted by Greenidge's complaint to Supervisor Crawford about the soccer team's previous failure to tip the skycaps—a matter of mutual concern among them—the skycaps initially refused to attend to the team. All of the skycaps acted together, and they were subsequently disciplined as a group for their response to Greenidge's statement. Thus, at each step of the way, the evidence shows that Greenidge's objection cannot reasonably be dismissed as a purely personal concern, as the majority does.[27] Rather, the Board should find that it qualified as "concerted" activity under well-settled Board and court precedent.

B.

Just as it errs with respect to whether Greenidge's protest was concerted, the majority erroneously concludes that the protest was not for "mutual aid or protection." "The concept of 'mutual aid or protection' focuses on the *goal* of concerted activity;" here, Greenidge's obvious concern that the skycaps be compensated fairly for work performed. *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153. That the Respondent was not directly responsible for the skycaps' tips does not mean that group action related to tips was not for "mutual aid or protection." In fact, the "mutual aid or protection" element is easily satisfied in this case. By broadly holding that tips are not matters of "mutual aid or protection," my colleagues have unquestionably curtailed the Act's protection for tipped employees who engage in any form of concerted conduct involving this critical aspect of their working conditions.[28]

As the Board observed in *Fresh & Easy Neighborhood Market*, supra, the Supreme Court has endorsed the view that "Congress designed Section 7 'to protect concerted activities for the *somewhat broader* purpose of "mutual

[24] My colleagues deem my criticism of their factor-based approach an "alarmist response," because this case is not within the "heartland" of concerted activity. But Sec. 7 rights are the core of the Act, and they should be protected to the full extent Congress intended, not cut back for the sake of predictability (the majority's stated aim). If Sec. 7 were interpreted down to nothing, of course, predictability would be achieved, but at the expense of the purpose of the statute. The majority is similarly incorrect not to recognize that what begins on the "borderline" may well lead to the "heartland." As the Board has observed, "almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals. . . ." *Fresh & Easy Neighborhood Market*, supra, at 153 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

[25] See *MCPc,* supra, 813 F.3d at 484 (endorsement of Board's concerted activity finding in cases of "lone employee who complains to management in a less organized group context and who, in so doing, successfully attracts the impromptu support of at least one fellow employee"); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 24–26 (D.C. Cir. 2011) (finding protected concerted activity where employees objected to a new break policy in front of other employees while on the job); *Colders Furniture*, 292 NLRB 941 (1989), enfd. sub nom *NLRB v. Henry Colder Co.*, 907 F.2d 765 (7th Cir. 1990) (spontaneous lunchroom discussion among employees led to employee's impromptu visit to manager's office to make concerted complaint); *Salisbury Hotel*, 283 NLRB 685, 686, 694 (1987) (complaints exchanged among employees themselves were concerted where they led to group protest to management).

[26] See *NLRB v. Talsol Group*, 155 F.3d 785, 791, 797 (6th Cir. 1998) (employee's questions of management concerning details of safety policy found to be concerted inducement of group action).

[27] As noted, the majority mistakenly relies on Greenidge's testimony that his remark was "just a comment," as "[a]n employee's subjective motive for taking action is not relevant to whether that action was concerted." *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153 (internal citations omitted). Further, whatever Greenidge's subjective intent, his coworkers plainly did not understand it as a purely personal concern to him. Why else did they follow his lead? Query, moreover, whether the majority would find the converse to be true: if an employee is credited as subjectively intending to induce group action, but there is no objective evidence supporting that aim, is the conduct concerted? Compare *Citizens Investment*, supra 342 NLRB at 316 fn. 2 (disavowing any reliance on employee's subjective statement that he intended to engage in concerted activity).

[28] The majority accuses me of inappropriately turning this case into a "referendum" on the Act's protections for tipped employees, because "[n]othing in [the] holding should be read as reducing the Act's protection for employees whose pay is in part comprised of tips." Except, that is exactly what my colleagues are doing—expressly finding that Greenidge's remark was not for mutual aid or protection because he was a worker whose compensation involved tips and his comment was directed toward this aspect of his compensation.

aid or protection" as well as for the narrower purposes of "self-organization and collective bargaining."" 361 NLRB at 154 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Thus, the "mutual aid or protection" clause encompasses a wide swath of employee activity that has the potential to "improve their lot as employees." Id. This necessarily includes employees' shared "interests as employees," even if they do not "relate to a specific dispute between employees and their own employer over an issue which the employer has the right or power to affect." *Eastex, Inc. v. NLRB*, supra, 437 U.S. at 563, 566–567. As with "concerted" activity, the concept of "mutual aid or protection" has its limits, but those limits are reached only when there is a highly "attenuated" connection to workplace interests. Id. at 567–568. The present case falls well within that limit.

Greenidge's comment raised an issue of shared interest among all skycaps and other employees: how much they were paid. Tips constituted the lion's share of the skycaps' earnings, a common reality faced by many service workers. Indeed, for many if not most tipped employees, few subjects impinge more dramatically on working conditions than the amount of their tips. The federal minimum wage for tipped workers is $2.13[29] and tips generally make up the remainder of their hourly earnings. For restaurant workers, who make up the largest portion of the tipped work force, tips can make up over half their income (leaving some below the poverty level *even after* accounting for tips).[30] Consequently, for most employees, and certainly for the skycaps in this case, discussions about the amount of tips directly concern their compensation, are integral to their "interests as employees," and are thus for "mutual aid or protection." *Eastex*, supra, at 567. Thus, Greenidge's comment directly implicated the skycaps' interests as employees and fell comfortably within the scope of Section 7's "mutual aid or protection" clause.

The majority's contrary view misunderstands both the broad language of Section 7 and the workplace reality for tipped workers by inexplicably holding that Greenidge's comment was unrelated to terms and conditions of employment, despite overwhelming evidence to the contrary.[31] In particular, there is no merit at all to the majority's argument that the skycaps' tips were solely a matter between them and airline passengers. As discussed, there can be no denying that tips fall within the broad ambit of matters within the shared interests of employees, regardless of whether the tips were within the Respondent's control or even a term or condition of employment. Moreover, tips are clearly an implicit part of skycaps' terms and conditions of employment, as both employers and employees in tip-reliant industries expect and depend upon the fact that tips will supplement direct wages and thus provide for adequate overall compensation. Indeed, the Respondent was legally permitted to pay the skycaps less than the state and federal minimum wage precisely because the skycaps were expected to work for and receive tips. Not surprisingly, the Board has recognized that tips, particularly in customer-service-oriented industries, are properly regarded as a component of wages, and thus are a term and condition of employment, *even when the employer is not the source of those tips*. See generally *The Capitol Times Co.*, 223 NLRB 651–652 (1976), overruled on other grounds by *Peerless Publications*, 283 NLRB 334 (1987).[32] That recognition is grounded in the common sense understanding that the payment of customer tips to an employee actually bears on the employer-employee relationship, not least of all because the employer benefits when employees are rewarded and encouraged to provide good services on the employer's behalf. Id. For this reason, the majority's insistence that the Respondent was "essentially detached" from the skycaps' concern over their tips is baseless.[33]

[29] This is the amount the employer must directly pay tipped employees. The difference between the $2.13 minimum wage and the standard $7.25 minimum wage must be made up for in tips, or else the employer will have to make up the difference in order to be in compliance with the federal minimum wage. States often establish their own minimum and tipped-employee minimum wages.

[30] See Irene Tung, National Employment Law Project, *Wait Staff and Bartenders Depend on Tips for More Than Half of Their Earnings*, available at *https //www.nelp.org/ publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/*.

[31] It perhaps suggests an excess of zeal to roll back existing precedent that my colleagues see fit to find no violation here based on the fact that Greenidge's conduct was *neither* concerted *nor* for mutual aid or protection, when either holding would have sufficed to resolve the case on their terms.

[32] Contrary to my colleagues' view, *Capitol Times* does not suggest that tips are matters of concern for employees only insofar as they are distributed through some sort of tip-sharing arrangement. Naturally, any matter that is a term of employment *akin to wages*—as *Capitol Times* held tips to be—is at the core of tipped workers' "interests as employees." Further, *Capitol Times*, by citing waiters' tips as a mandatory subject of bargaining—and given that waiters typically earn their tips directly from customers—suggests that the bargaining obligation regarding tips encompasses mechanisms affecting direct customer tips. Although employers cannot bargain over the amount a customer gives, obviously they can bargain over mechanisms to encourage customer tipping or means to supplement employees' direct pay when tips are inadequate.

[33] The Supreme Court's decision in *Eastex* also undercuts the majority's position that Greenidge's comment concerned a matter solely between the skycaps and the passengers. *Eastex* itself involved protests concerning federal and state law—matters further afield than customer tips from the employer-employee relationship. The *Eastex* Court nevertheless found that a wide range of factors—including matters not

Moreover, the Respondent actually possessed some ability to resolve the skycaps' concern over poor tipping in general, and the possibility of the soccer team's poor tipping in this particular case. In fact, the Respondent had a number of potential mechanisms by which to do so. The Respondent could have responded to the employees' concerns by raising their base compensation to offset inadequate tips, whether on an ongoing or ad hoc basis. It could have taken steps to encourage voluntary customer tipping. And here, of course, the skycaps' protest prompted their supervisor to relay their concerns to managers of the airline terminal[34]—which was the Respondent's direct client—thus demonstrating that the Respondent was far from helpless in seeking some recourse for its employees' concerns.[35]

The majority insists that absent "evidence that [Greenidge] was dissatisfied with the existing tipping arrangements or wanted them to be modified," his complaint cannot be regarded as "seeking 'to improve terms and conditions of employment.'" But pay for work is obviously a term and condition of employment, whether it involves an annual salary, an hourly wage, or a one-time tip. Greenidge plainly spoke up because he feared the skycaps would be paid too little—as the result of a poor tip—for a difficult task. Nothing in Section 7 of the Act suggests that in order for his complaint to be for the "mutual aid or protection" of employees, it had to include a reference to tipping arrangements generally or a proposal for modifying them—any more than the employees in the Supreme Court's famous *Washington Aluminum* case were required to make a specific demand on their employer to fix the furnace before walking out of the plant on a bitterly cold winter day.[36]

The majority points to one case, *Universal Syndications*, 347 NLRB 624 (2006), to support its view that the Respondent had no interest in the tips its skycaps received from passengers. But that case is plainly distinguishable. In *Universal Syndications*, the Board found that the employer was "essentially detached" from a dispute among employees that arose from a private arrangement among them regarding tip money for a pizza delivery driver. By contrast, the Respondent had a far more direct and immediate interest in the tips the skycaps received for providing services on its behalf, as confirmed by Supervisor Crawford's agreement to bring the skycaps' concern to the terminal managers' attention.

For all of those reasons, Greenidge's objection to handling the soccer team's equipment plainly was for the "mutual aid or protection" of the skycaps as a group.

III.

Against the weight of precedent, common sense, and even a basic sensitivity to workplace realities, the majority concludes that workers generally do not seek to induce group action, and thereby exercise their right to engage in concerted activity under Section 7 of the Act, when they spontaneously protest their working conditions. Ironically, the majority decision purports to adhere to established precedent, which calls for examining the full context of an employee's conduct to determine whether it was intended to induce group action. Yet my colleagues themselves impose arbitrary restrictions on what constitutes concerted activity, ignoring workplace realities and the wide range of means by which employees might protest unfair conditions.

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even "relate[d] to a specific dispute between employees and their own employer," id. at 563, 567—are matters of mutual aid or protection. Although Greenidge, unlike the employees in *Eastex*, did not appeal to legislative, judicial, or administrative forums, the Court made clear that the scope of the clause was far broader, including "*much legitimate activity* that could improve their lot as employees." Id. at 566 (emphasis added). Certainly, a verbal protest, directed not at a third-party government entity but at one's own employer, regarding a central workplace concern, is well within the bounds of mutual aid or protection.

[34] The majority claims that I distort the record here because Crawford raised the tipping concern with managers from the Respondent's clients in response to the skycaps' walking away from the soccer team––which was not alleged to be concerted activity that caused the discharge—and not by Greenidge's remark, on which the General Counsel's theory of the case rests. My colleagues misunderstand the point. The broad issue here is whether an employer such as the Respondent possesses the ability to take steps to try to address an employee's tipping complaint. Thus, the fact that the Respondent *did* take steps here, regardless of whether it was in response to Greenidge's statement or to the skycaps' walking away, supports the general principle that an employer has the means to address employee concerns over poor tips.

[35] See, e.g., *Nellis Cab Co.*, 362 NLRB 1587 (2015), in which the Board held that taxicab drivers' brief work stoppage to protest a city proposal to issue additional taxi medallions was for "mutual aid or protection" because increased availability of medallions threatened to reduce the drivers' pay. Recognizing that the employer could not directly control the city's decision, the Board nevertheless reasoned that the employer could reasonably be expected to influence such a decision, and indeed attempted to do so. Id., slip op. at 2. Cf. *Mojave Electrical Cooperative, Inc.*, 327 NLRB 13 (1998), enfd. 206 F.3d 1183 (D.C. Cir. 2000) (employees' petition for injunctive relief against harassment by two officials employed by a subcontractor with whom their employer did business was for the purpose of mutual aid or protection). My colleagues suggest that *Nellis* is distinguishable because there was evidence the employer there could influence the cab medallion decision. But, as explained, the Supreme Court's decision in *Eastex* does not require that an employer have control over a matter for it be a subject of mutual aid and protection. Further, as I have discussed, an employer like the Respondent that relies on tips to provide a substantial portion of its compensation package self-evidently has means to address employee concerns over tips.

[36] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) ("We cannot agree that employees necessarily lose their right to engage in concerted activities . . . merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.").

My colleagues compound their error by incorrectly holding that an employee's protest of low customer tips is not a matter of mutual aid or protection, and thus that concerted protests involving tips are not statutorily protected. In so holding, the majority ignores the breadth with which the Supreme Court has interpreted Section 7's "mutual aid or protection" clause and turns a blind eye to the reality faced by many service workers that tips are a vital component of their total compensation. Indeed, it will come as a great surprise to the millions of tipped workers who depend on tips for most of their pay that the Board has today declared that tips are not a term and condition of their employment. Because I cannot join a decision so at odds with precedent and the goals of the National Labor Relations Act, I dissent.

Dated, Washington, D.C. January 11, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Colleen Breslin Esq., for the General Counsel.
Ian B. Bogaty Esq. and *Kathryn J. Barry Esq.,* for the Respondent.
Brent Garren Esq., for Local 32B/J SEIU.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on various dates in Brooklyn, New York. The charge in this proceeding was filed on November 13, 2013, and the complaint was issued on November 21, 2014. In substance, the complaint alleged that on or about July 19, 2013, the Respondent discharged Trevor Greenidge because of his concerted activity of complaining about the amount of tips received.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties stipulated that Alstate Maintenance, LLC, located in Rockville Centre, New York, is engaged in providing ground services at JFK Airport. They also stipulated that during the past calendar year, it purchased and received at its Rockville Center facility goods and supplies valued in excess of $50,000 directly from points outside the State of New York and performed services valued in excess of $50,000 for Lufthansa Airlines, Air France and Aero Mexico, which are themselves directly engaged in interstate commerce.

The question here is whether Alstate as a contractor performing services for airlines, is exempt from the NLRA's jurisdiction and should be covered by the Railway Labor Act. Section 2(2) of the National Labor Relations Act excludes any person subject to the RLA.

This case is related to Case 29–CB–103994. That case, although involving a different set of transactions, involved the same employer. And for the same reasons set forth in that case, JD(NY)–12–16, I find that Alstate is not covered by the National Mediation Board, but is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Alstate has a contract to perform services for an airline consortium at terminal 1 located at JFK airport. Among the airlines using this terminal is Lufthansa. Alstate's employees are classified as skycaps, wheelchair agents, baggage handlers, passenger service agents, boarding gate agents, and CTX baggage handlers.

Trevor Greenidge, at the time of his discharge, was employed as a skycap. In this job, he earned the minimum wage for tipped employees and the remainder of his income consisted of passenger gratuities. And although the minimum wage for skycaps is lower than for others, it appears that this is a desired job because tips more than compensate for the lower wage rate.[1]

During the evening of July 17, 2013, Greenidge was working at terminal 1 with a group of other skycaps whose names were Allan Wills, Terrence Boodram, and Basil Rodney. From the account of the witnesses, this was a slow time.

At some point during the early evening, the skycaps were notified by Respondent's supervisor, Crawford, that Lufthansa Airlines had requested Alstate to provide four skycaps to meet and assist a van that was soon to arrive with a soccer team and their equipment. Upon receiving this notification Greenidge commented to the other skycaps that: "We did a similar job a year prior and we didn't receive a tip for it."

The credible evidence shows that when the van arrived, the four skycaps did not go to the van to offer assistance in unpacking the luggage. Instead, despite being waved over, they walked away. At this point, Lufthansa's manager, Isabelle Roeder, told the terminal one Manager, Klaudia Fitzgerald, that there was no one willing to assist with the baggage. Shortly thereafter, while Roeder was standing outside with the van, Alstate's supervisor, Crawford, told her that the skycaps did not want to take the equipment because they did not think that they would get a big enough tip. In my opinion, the skycaps simply refused to assist the soccer team with their equipment and luggage and thereby

[1] The General Counsel claims that the minimum wage paid to skycaps and skycap captains was lower than what was permitted under the relevant wage-and-hour laws. She cites to the fact that several months ***after*** Greenidge was discharged, the New York Attorney General's Office began an investigation regarding their pay rates. I do not know whether the skycaps were paid in accordance with either Federal or State law and it is not within my jurisdiction to make such a determination. More importantly, for purposes of this case, there is no evidence that Greenidge initiated or was involved in that investigation or that the Respondent was motivated by that investigation in its decision to discharge him.

refused to do their jobs. It is also clear that their refusal was based on the belief that the soccer team would not be generous in their tips. The result was that Alstate brought in a group of baggage handlers to do the work and only after the baggage handlers started bringing in the luggage, did the skycaps begin to assist the customer. Notwithstanding the initial refusal of the skycaps to assist, Lufthansa gave them an $83-tip.

With respect to the above, it should be noted that although tips comprise a substantial part of a skycap's income, it cannot be construed as a wage that is paid by their employer. For better or worse, the custom of tipping in the United States, puts the onus on the customer and not the employee's employer. If a customer refuses to tip (or gives an inadequate tip), this is not a matter that is addressable between the employee and his or her employer. In this case, the reason for the refusal to perform work was the perceived dissatisfaction with the customer and not with Alstate. Perhaps it would have been a different matter, if Greenidge and the other skycaps had concertedly complained to Alstate and engaged in a work stoppage in order to compel the Respondent to raise their wages or in some other fashion compensate them in lieu of tips.[2] But that is not what happened here. This particular dispute was between the skycaps and the soccer team. It was not between the skycaps and the Respondent.

That night, Fitzgerald sent an email to Alstate's managers, Deb Traynor and Vince Orodisio and to Ed Paquette, the manager of terminal one. This stated:

> As you may be aware, a French soccer team is travelling on LH405 tonight and on behalf of Lufthansa, we had requested skycap services. There were no issues with the soccer team players regular baggage as they dropped them off directly at the pit, however, the equipment was a totally different story. At approximately 1900 hrs, we were advised by LH that the truck with the equipment was stuck in traffic and wasn't going to arrive for at least another hour, but at 1920 LH ASM Isabelle informed that the equipment should be arriving in the next five minutes. I requested assistance from Crawford via radio to mobilize all the sky caps so that they are standing by. I observed only one skycap standing outside, but not assisting the soccer team and LH ASM Isabelle. I proceeded outside and at this point Crawford was explaining to Isabelle that the skycaps don't want to handle it because of the large quantity of bags and a small tip. I interjected and instructed Crawford to get all the skycaps on departures by revolver #2 to handle these bags immediately. As per Crawford and LH Isabelle, Wills was one of the skycaps who refused to assist and eventually showed up after being called on the radio for the third time. I believe Crawford will fill you in with the additional details as to who were the other employees and supervisors being uncooperative. In attempt to compensate for the mishandling, I asked Crawford to send over few [sic] baggage handlers to assist and Crawford went above and beyond to do so. One of the soccer coaches said to LH ASM that they might as well handle these bags themselves. Even after providing this substandard service, the skycap captain received a tip from LH Isabelle. I'm wordless; how service provider [sic] employees don't comprehend their job descriptions, why they have jobs and would refuse to provide skycap services to a partner carrier or any customer for that matter. I must say that in my entire professional career I have never been this embarrassed in front of the customer and I expect that you thoroughly investigate and take appropriate action immediately. I had personally apologized to LH ASM Isabelle on behalf of Terminal One and Alstate, but would highly suggest that you do the same.

On the following morning there was a series of emails between Paquette and Alfred DePhillips. The first of which was sent at 5:28 a m.

> This is totally unacceptable and embarrassing to say the least. I expect a full report on my desk before lunchtime.
> I want each of the SKYCAPs involved removed from the Terminal One project immediately, the supervisors as well. I do not need supervisors on duty who cannot control their people.
> Figure out how you are going to cover the vacancies as I also expect uninterrupted service.

At 12:25 p m., Paquette sent a second email that stated:

> It's now 12:30 and I have yet to hear from anyone regarding this incident or the one Neil sent to you regarding wheelchairs.
> If I do not hear from someone shortly I will pull everyone I think was Involved from the swipe system.[3]

At 12:37 p m. DePhillips replied:

> We have not ignored the issue at hand. We are currently finishing our investigation. Our report will be to you shortly.

At 1:07 p m. Deborah Traynor responded to Paquette's email. This read:

> Based on my investigation this morning all 4 skycaps will be removed from service, it is unacceptable to Alstate as well to speak or behavior [sic] unprofessional [sic] at any time while doing your Job. Based on the video footage I watched, the equipment was taken from the truck into the terminal in 12 minutes. I do understand that it was not the service provided but the lack of professionalism on Alstate employee's part. I assure you that the removal of this employees will not impact Terminal Ones operation

At 2:35 p m. Paquette replied to Traynor's email and stated:

> Can I please have the names of the four individuals so that I can have Gary remove them from the Terminal One system.

Subsequent to this exchange of emails, the respondent, by

[2] For example, in many European countries, restaurants add a service charge to a customer's bill and customers are not expected to tip the restaurant's staff.

[3] The swipe system refers to the use of a card that allows a person entry to certain nonpublic parts of the terminal.

Traynor, informed each of the four skycaps that they were discharged for the circumstances surrounding the Lufthansa incident. The discharge letter to Greenidge states:

> You were indifferent to the customer and verbally make comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa.

The letters given to the other skycaps also indicate that the reason for the discharges was because of their refusals to perform their duties and the comments made about tipping.

After the four skycaps were discharged, they filed grievances with Local 660, United Workers of America which at that time had a contract with the Respondent. It appears that after a period of time, the other three skycaps were offered jobs at the Respondent's sister company, Airway Cleaners. Goodridge was not offered employment.

Analysis

In pertinent part, Section 7 of the Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities…

The provisions relating to "other concerted activity" for the purpose of "other mutual aid or protection," are interpreted broadly and encompass activity that need not be related to union activity. *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, (5th Cir. 1981) (refusal to work in the face of dangerous working conditions); *Walls Mfg. Co. v. NLRB*, 321 F.2d 753 (D.C. Cir. 1963) (writing a letter about sanitary conditions on behalf of fellow employees).

In order to be covered by Section 7, the activity must be concerted in the sense that it is ordinarily engaged in by two or more employees. However, the Board has found that actions by an individual employee may be construed as concerted in a variety of circumstances. For example, if an individual seeks to enforce a collective-bargaining agreement by, for example filing a grievance involving only himself, this will be construed as concerted because it is in furtherance of enforcing a collectively bargained contract. *NLRB v. City Disposal System*, 465 U.S. 822 (1984). Also, activity by a single person may be construed as concerted if it is done in an effort to gain the support of other employees for some type of action, or if it is done on behalf of or in support of the interests of other employees. *Beyoglu*, 362 NLRB 1238 (2016) (lawsuit filed by an individual as a class action for overtime wages construed as concerted activity).

On the other hand, activity by a single individual for that person's own personal benefit is not construed as concerted activity. *NLRB v. Adams Delivery Services*, 623 F.2d 96 (9th Cir. 1980) (individual griping about his overtime pay was not concerted activity); *Pelton Casteel Inc., v. NLRB*, 627 F.2d 23 (7th Cir. 1980) (venting of personal grievance not concerted activity).

In order to fall within the protection of Section 7, the activity has to have some relationship to the wages, hours, or other terms and conditions of employment of employees and not to matters that are personal or unrelated to those subjects. *MCPc, Inc*., 360 NLRB 216 (2014); *Plumbers Local 412*, 328 NLRB 1079(1999). For example, in *Waters Orchard Park*, 341 NLRB 642 (2004), a Board majority concluded that two employees who called a New York State hotline to report that patients were experiencing excessive heat were not engaged in protected activity. Two of the Board members stated that the employees' calls to the hotline did not involve a term or condition of their employment and were not otherwise an effort to "improve their lot as employees." They concluded that this only involved a concern for the quality of care of patients, and therefore did not involve the interests "encompassed by the mutual aid or protection clause." In a concurring opinion, member Meisburg stated that "the statutory language is not infinitely malleable. It was not intended to protect every kind of concerted activity, no matter how salutary." He went on to state; "Absent an intent to improve wages, hours or working conditions, concerted action of the type in this case cannot be deemed" "mutual aid or protection" because the employees testified that their sole motive was to act in the interests of their patients.

In *Metro Transport LLC d/b/a Metropolitan Transportation Services*; 351 NLRB 657, 661–662, (2007) the claim was that a group of mechanics were unlawfully suspended because they protested the discharge of a supervisor. In concluding that this was not concerted activity for mutual aid and protection, the Board, with Member Liebman dissenting, applied a three part test: (1) whether the protest originated with the employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; and (3) whether the identity of the supervisor was directly related to the employees' terms and conditions of employment. The Board majority noted that even assuming that the first two parts of the test were met, the suspension allegation had to be dismissed because there was no relationship between the supervisor and the mechanics' terms and conditions of employment. The Board noted that the record showed that the mechanics were only concerned with the supervisor's employment situation and made no mention of their own interests.

In my opinion, Section 7 affords employees protection for engaging in concerted activity for their mutual aid and protection but this encompasses matters relating to their own or to other workers' wages, hours and/or other terms and conditions of employment. In *MCPc, Inc*., supra, the Board stated:

> In agreement with the judge, we find that Galanter engaged in concerted activity when discussing with other employees their terms and conditions of employment—staffing shortages resulting in heavy workloads—which constituted protected concerted activity under *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). See *Worldmark by Wyndham*, 356 NLRB No. 104 [765], slip op. at 2 [766] (2011) ("[T]he Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees.").

It is a violation of Section 8(a)(1) for an employer to discharge or discipline an employee or employees who engage in protected concerted activity. In order to establish a primae facie case the General Counsel is required to show that the employee(s) engaged in protected activity and that the activity was a motivating reason for the employer's action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 399 (1983) (approving *Wright Line* analysis). Assuming that the General Counsel meets that burden, then the Respondent can defend its action by establishing that it would have taken the same action notwithstanding the employee's concerted activity.

The entire theory of the General Counsel's case is that on July 17, 2013, Greenidge engaged in concerted activity when, while waiting for the arrival of the van carrying a French soccer team, he said to the other skycaps; "We did a similar job a year prior and we didn't receive a tip for it." This single statement by Greenidge did not call for or request the other skycaps to engage in any type of concerted action or to otherwise make any kind of concerted complaint to their employer about their wages. In my opinion, this was simply an offhand gripe about his belief that French soccer players were poor tippers.

I also do not think that Greenidge's comment can be construed as concerted activity because it did not relate to the skycap's wages, hours, or other terms and conditions of employment.

It is of course true that for income tax purposes, tips are considered to be part of an employee's wages by the IRS. But they are not considered to be a deductible expense for the employer as they are not construed as wages paid by the employer. Although constituting a large portion of a skycap's income, tips are not moneys received from their own employer. Instead, they are received as gratuities from customers. Indeed, in this case, the tips received by skycaps are twice removed from the Respondent as they are received from Alstate's customer's customers. The fact is that if there was any dispute in this case, it was not between the employees and the Respondent. As noted above, a comment about the poor tipping habits of French soccer players was not and could not be addressed by the skycap's employer as this was not within Alstate's control.

Accordingly, I hereby recommend that the complaint be dismissed.

Dated, Washington, D.C. June 24, 2016

SuperShuttle DFW, Inc. *and* Amalgamated Transit Union Local 1338. Case 16–RC–010963

January 25, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this case is whether franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth are employees covered under Section 2(3) of the National Labor Relations Act or independent contractors and therefore excluded from coverage. On August 16, 2010, the Acting Regional Director issued a Decision and Order in which she found, based on the Board's traditional common-law agency analysis, that the franchisees in the petitioned-for bargaining unit were independent contractors, not statutory employees. Accordingly, she dismissed the representation petition at issue.

Thereafter, pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a request for review of that decision. On November 1, 2010, the Board granted the Union's request for review. The Union and the Employer filed briefs on review, and the AFL–CIO filed an amicus brief. The Employer also filed a response to the AFL–CIO's brief.

Before the Board issued its decision on the Union's request for review, it issued its decision in *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx*), enf. denied 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx II*), in which a Board majority purportedly sought to "more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss." Id. at 610. The Board majority explicitly declined to adopt the holding of the United States Court of Appeals for the District of Columbia Circuit in a prior *FedEx* case[1] "insofar as it treats entrepreneurial opportunity (as the court explained it) as an 'animating principle' of the inquiry." *FedEx Home Delivery*, 361 NLRB at 610. Rather, the Board found that entrepreneurial opportunity represents merely "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." Id. at 620 (emphasis in original).

In so doing, the Board significantly limited the importance of entrepreneurial opportunity by creating a new factor ("rendering services as part of an independent business") and then making entrepreneurial opportunity merely "one aspect" of that factor. As explained below, we find that the *FedEx* Board impermissibly altered the common-law test[2] and longstanding precedent, and to the extent the *FedEx* decision revised or altered the Board's independent-contractor test, we overrule it and return to the traditional common-law test that the Board applied prior to *FedEx*, and that the Acting Regional Director applied in this case.

Having carefully reviewed the entire record, including the parties' briefs and the amicus brief on review, and applying the Board's traditional independent-contractor analysis, we affirm the Acting Regional Director's decision and her finding that the franchisees are independent contractors. Accordingly, we dismiss the petition.

I. LEGAL FRAMEWORK

A. The Common-Law Agency Test

Section 2(3) of the Act, as amended by the Taft-Hartley Act in 1947, excludes from the definition of a covered "employee" "any individual having the status of an independent contractor." 29 U.S.C. § 152(3). The party asserting independent-contractor status bears the burden of proof on that issue. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001); accord *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof).

To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). The inquiry involves application of the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency §220 (1958):

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> (d) The skill required in the particular occupation.

[1] *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*).

[2] As the Board noted in *Roadway Package Systems, Inc.*, 326 NLRB 842, 849 (1998), Supreme Court cases "teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it."

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in business.

In applying these factors, the Court noted that there is no "shorthand formula" and held that "all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Id. at 258.

B. Developments Since United Insurance

In the 50 years since the Supreme Court's decision in *United Insurance*, the Board and the courts have revisited and refined the proper application of the common-law factors to the independent-contractor analysis. See, e.g., *Roadway Package System, Inc.*, 326 NLRB 842 (1998), *St. Joseph News-Press*, 345 NLRB 474 (2005), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998) (considering, among other things, (1) the Board's authority to change or modify the common-law right-of-control test to determine if an individual is an employee; (2) the relative importance of factors indicative of employee or independent-contractor status; and (3) evidence of financial gains and losses by drivers in the *Roadway* cases). The District of Columbia Circuit Court of Appeals observed in *FedEx I*, 563 F.3d at 497, that over time, the Board, while retaining all the common-law factors, had shifted the emphasis from control to whether putative independent contractors have significant entrepreneurial opportunity for gain or loss (citations omitted). The court noted that "while the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id. Further, the court noted that the common-law test "is not merely quantitative . . . there also is a qualitative assessment to evaluate which factors are determinative in a particular case, and why." Id. at 497 fn. 3. Thus, entrepreneurial opportunity is not an individual factor in the test[3]; rather, entrepreneurial opportunity, like employer control, is a principle to help evaluate the overall significance of the agency factors. Generally, common-law factors that support a worker's entrepreneurial opportunity indicate independent-contractor status; factors that support employer control indicate employee status. The relative significance of entrepreneurial opportunity depends on the specific facts of each case.[4]

In 2014, the Board again reviewed its independent-contractor analysis in *FedEx Home Delivery*, 361 NLRB 610, involving the drivers at a FedEx facility in Hartford, Connecticut. The Board majority sought "to more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss." Id. at 610. The Board held that it would give weight to actual, not merely theoretical, entrepreneurial opportunity, and that it would necessarily evaluate the constraints imposed by a company on an individual's ability to pursue this opportunity. In addition, the Board held that it would evaluate—in the context of weighing all relevant common-law factors—whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.[5] The Board held that this factor would encompass not only whether the putative contractor has a significant entrepreneurial opportunity, but also whether the putative contractor (a) has a realistic ability to work for other companies; (b) has a proprietary or ownership interest in his work; and (c) has control over important business decisions, such as the scheduling of performance, the hiring, selection, and assignment of employees, the purchase of equipment, and the commitment of capital.[6]

C. Other Relevant Board Law

In applying the common-law test to the taxicab industry, the Board has given significant weight to two factors: "the lack of any relationship between the company's compensation and the amount of fares collected," and

[3] Although the Board has occasionally listed entrepreneurial opportunity as a separate factor, see, e.g., *Pennsylvania Academy of Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004), it is not one of the factors listed in the Restatement (Second) of Agency.

[4] Despite our dissenting colleague's overwrought claims to the contrary, the D.C. Circuit does not (and we do not) consider entrepreneurial opportunity to be a "super-factor," an "overriding consideration," a "shorthand formula," or a "trump card" in the Board's independent-contractor analysis. But as our review of the Board's case law shows, entrepreneurial opportunity, however it is characterized, has always been at the core of the common-law test.

[5] Id. at 620.

[6] Id. at 621.

"the company's lack of control over the manner and means by which the drivers conduct business after leaving the [company's] garage." *AAA Cab Services*, 341 NLRB 462, 465 (2004) (citing *Elite Limousine Plus*, 324 NLRB 992, 1001 (1997)); *City Cab Co. of Orlando*, 285 NLRB 1191, 1193 (1987).[7] The Board has also held that when a driver pays a company a fixed rental and retains all fares he collects without accounting for those fares, there is a strong inference that the company does not exert control over the means and manner of his performance. *Metro Cab Co.*, 341 NLRB 722, 724 (2004). The theory underlying this inference is that in a flat-rate system, the company makes its money irrespective of the fares received by drivers; therefore, the company has no compelling reason to try to control the means and manner of the drivers' performance. Id.

Finally, the Board has held that requirements imposed by governmental regulations do not constitute control by an employer; instead, they constitute control by the governing body. *Elite Limousine Plus*, 324 NLRB at 1002. The Board has stated that employee status will be found only where "pervasive control" by the private employer "(exceeds) governmental requirements to a significant degree." *Teamsters Local 814 (Santini Bros. Inc.)*, 223 NLRB 752, 753 (1976), enfd. 546 F.2d 989 (D.C. Cir. 1976), cert. denied 434 U.S. 837 (1977); see also *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 875–876 (D.C. Cir. 1979); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983).

II. FACTUAL BACKGROUND

SuperShuttle Dallas-Fort Worth (DFW), an independent business entity, maintains a license agreement with SuperShuttle International and SuperShuttle Franchise Corporation for the right to use the SuperShuttle trademark and transportation system in the Dallas-Fort Worth area. SuperShuttle International, which owns the SuperShuttle name, logo, and color scheme, develops proprietary software for dispatching, cashiering, and taking reservations for use in administering a shuttle van transportation system. Pursuant to the license agreement, SuperShuttle DFW is permitted to market and deploy the SuperShuttle transportation system in its designated local market.

The SuperShuttle DFW franchisees in the petitioned-for unit primarily transport passengers to and from Dallas-Fort Worth and Love Field airports. Before 2005, SuperShuttle DFW designated its drivers as employees. During that period, SuperShuttle assigned drivers—who earned hourly wages—to regularly scheduled shifts picking up customers in company-owned shuttle vans. In 2005, SuperShuttle converted to a franchise model, which remains in place. Under the current franchise model, drivers are required to sign a 1-year Unit Franchise Agreement (UFA) that expressly characterizes them as nonemployee franchisees who operate independent businesses.[8] Franchisees are required to supply their own shuttle vans and pay SuperShuttle DFW an initial franchise fee and a flat weekly fee for the right to utilize the SuperShuttle brand and its Nextel dispatch and reservation apparatus. Franchisees work no set schedule or number of hours or days per week; they work as much as they choose, whenever they choose. Franchisees are then entitled to the money they earn for completing the assignments that they select. Individual franchisees may also hire and employ relief drivers to operate their vans.

Amalgamated Transit Union Local 1338 (the Union) seeks to represent a unit of SuperShuttle DFW drivers, including those who operate as franchisees pursuant to the UFA, and relief drivers. At the time of the hearing, there were approximately 88 drivers who operated as franchisees and 1 relief driver.

A. Airport Contract and Permits

SuperShuttle DFW is permitted to operate at DFW Airport pursuant to a shared-ride contract (Airport Contract) between the Company and the Dallas-Fort Worth International Airport Board, a public governmental agency.[9] The 130-page document has extensive terms, which dictate most of the ways that SuperShuttle DFW operates its business. The Employer is required to maintain a customer complaint procedure, screen franchisees for drugs and alcohol, and train franchisees. As to the SuperShuttle vans, which franchisees must own or lease, the contract governs marking on the vans, the internal condition of the vans including the number of seats, vehicle maintenance requirements, and postaccident safety inspections. DFW Airport has the right to inspect vans operated by SuperShuttle and to audit SuperShuttle's compliance with the Airport Contract.

Under the Airport Contract, franchisees must have a permit issued by Airport Operations. SuperShuttle must perform criminal background checks, a driving history background check, and drug and alcohol screening in accordance with Department of Transportation standards.

[7] *FedEx*, supra, which involved package delivery drivers, did not purport to modify the Board's precedent regarding taxicab drivers.

[8] The agreement states that "persons who do not wish to be franchisees and independent business people but who prefer a more traditional employment relationship should not become SuperShuttle franchisees."

[9] Franchisees are not signatories to the Airport Contract. Although franchisees in the petitioned-for unit serve both DFW and Love Field airports, the Airport Contract entered into evidence only refers to DFW Airport.

A franchisee must be at least 19 years old, a legal resident, have a valid Texas driver's license, be able to effectively communicate in English, and not be suspended from another ground transportation service.

B. Unit Franchise Agreement

The Unit Franchise Agreement (UFA), which governs the relationship between the franchisees and SuperShuttle, describes the SuperShuttle transportation system and delineates how franchisees are to operate within that framework.[10] It is a standard agreement that is not subject to negotiation by individual franchisees.

Under the UFA, a franchisee, subject to some restrictions, pays an initial fee of $500 for the right to provide transportation to and from DFW and Love Field airports, or a $300 fee for access only to Love Field airport. In addition to the initial franchise fee, the UFA requires that franchisees pay to SuperShuttle a weekly system fee—$575 for a Dallas-Fort Worth and Love Field franchise and $375 for a Love Field franchise. This flat fee does not change and is not related to the amount of business that a franchisee generates. The weekly fee covers the franchise fee, the cost of providing the Nextel system through which franchisees bid on routes, and marketing of the SuperShuttle brand. Franchisees also pay a $250 decal fee.

C. Shared-Ride Vehicles

The UFA requires that franchisees purchase or lease a van that meets the system specifications, i.e., make, model, color, size, age, and mechanical condition.[11] SuperShuttle DFW General Manager Ken Harcrow testified that the average cost of a passenger van is about $30,000.[12] With regard to van acquisition, Harcrow testified that some franchisees get their own vans or leases, and that SuperShuttle also has a leasing company, Blue Van Leasing, to assist franchisees. Franchisees are also responsible for paying for gas, vehicle maintenance, tolls, and access fees. Franchisees park the vans at their homes, and there are no restrictions on franchisees using their vans for personal use.

The Airport Contract imposes guidelines regarding essential equipment and vehicle age and condition. For instance, the Airport Contract requires that all vehicles have, among other things, an air conditioner, heater, fire extinguisher, and credit card machine. The Airport Contract also includes detailed provisions regarding the physical condition of the vehicle; for example, the Contract requires that the vehicles be free of large dents, that all interior and exterior surfaces be free of dirt and grease, and that seats be consistent in color and have no more than two small holes. SuperShuttle dictates that all vehicles use the Company's trademarked blue-and-yellow paint scheme and logo.

The Airport Contract requires that shared-ride vehicles must pass a mechanical inspection on two separate occasions during the calendar year. Pursuant to the UFA, SuperShuttle has the right, without prior notice, to inspect any shared-ride vehicle. SuperShuttle conducts its own in-house inspection of vehicles every 60 days.

Franchisees must purchase insurance through a designated insurer. Franchisees must obtain licensing approval from DFW Airport, pay a licensing fee, and undergo background checks. Franchisees must also complete 34 hours of training and 18 hours of on-the-job training. The Airport Contract requires SuperShuttle to provide 8 hours of customer training in the first week and at least 16 hours per year. This training includes permit qualifications, vehicle requirements, duties and responsibilities under the Airport Contract, disciplinary guidelines, dress standards, customer service, and loading area and van requirements.

All SuperShuttle vans are equipped with a Nextel communications system owned and operated by SuperShuttle. Part of the franchisees' weekly fee covers the cost of operating the Nextel system. Franchisees also receive a pager, a two-way radio, and a global positioning navigation system, also owned and operated by SuperShuttle. Franchisees may use only equipment, signs, uniforms, and services approved by SuperShuttle.

D. Franchisees' Hours, Schedules, and Bid Process

Franchisees set their own work schedules and select their own assignments; SuperShuttle does not set schedules or routes, nor does it require franchisees to be active during certain days or hours. Thus, franchisees have complete control over their schedules. All bidding and work assignments are handled through the Nextel system. Generally, when a franchisee wants to start work and pick up an assignment, he can do so by turning on the Nextel apparatus. Customers can coordinate pickup

[10] The UFA notes that "[t]he airport ground transportation business is a regulated industry and, as a result, there are and will be a substantial amount of restrictions arising from government regulation . . . These restrictions are not imposed by SuperShuttle, but effectively are passed along in order to implement the governmental regulatory scheme."

[11] According to the Franchise Disclosure Document, the vehicle must seat 8 persons including the driver and be no more than 5 years old; acceptable models are the Ford Econoline, the Dodge B1500 or B2500, the Chevy Express, and the GMC Savana.

[12] The Franchise Disclosure Document that franchisees receive estimates that the total investment necessary to begin a SuperShuttle franchise is $18,100 to $40,500; this includes the cost of a vehicle, $300–$500 for the initial franchise fee, $250 for the application of decals, a security deposit of $1,500 for decals and specialized equipment, and the first payment of $50 to the weekly airport expense reimbursement fund.

requests and pay by credit card via the national SuperShuttle website or phone number. Once processed by SuperShuttle dispatchers, these requests appear on franchisees' Nextel devices as job "bids" that franchisees can choose to accept or decline. For each bid, the device displays the fare amount, the passenger's name and address, and the pickup time. If the franchisee declines a bid or fails to respond, the dispatcher will generate another bid for his consideration. Generally, a franchisee incurs no negative consequences from passing on a trip. However, if the franchisee accepts a bid, he is required to complete the pickup or he may be subject to a $50 fine that is paid to the franchisee who completes the job.

Several bidding variations occur within this general framework. In "available bidding," a franchisee will make himself available in his current location, and the system will generate a bid within a 20-mile radius. In "outbound finals bidding," franchisees who are leaving the airport enter their final destination, and the system automatically generates outbound bids near that destination. In "AM bidding," the dispatcher releases a list of bids at 7:30 p.m. for the next morning, and franchisees can pre-select jobs for the following day. In "stand bidding" and "holding lot bidding," franchisees line up at a set location, e.g., a hotel stand or a holding lot, and are offered bids in the order that they are assembled. In all variations, bids are processed through the Nextel device; franchisees are not permitted to use any other service or their personal cell phones to obtain business.

In addition to bidding, franchisees have the option to drive "hotel circuits," in which a franchisee is responsible for providing regularly scheduled pickup service at a hotel. General Manager Harcrow testified that SuperShuttle DFW maintains circuits that service major hotels in Dallas and Fort Worth. Franchisees who choose to drive hotel circuits are responsible for creating pickup schedules and writing bylaws for the route. If a franchisee is unable to drive his scheduled route, he is responsible for finding a replacement, with no involvement from SuperShuttle. Finally, a franchisee can run a charter service, which entails transporting non-airport passengers from one location to another. Charter jobs sometimes show up as Nextel bids. Franchisees can also arrange their own charter jobs, provided that they notify SuperShuttle at least 2 hours in advance and observe a 2-hour charter minimum. There is no record evidence of franchisees running charter operations. The Airport Contract specifically forbids franchisees from independently soliciting passengers at the Airport.

The Airport Contract is generally silent as to the specific operating procedures that SuperShuttle and its franchisees employ away from the airport. The Contract does set forth express pickup time goals that SuperShuttle is required to meet: no more than 15 minutes from the pickup request from 9 a m. to 9 p m., and no more than 20 minutes from the request from 9 p m. to 9 a m. The Airport Contract also requires franchisees to provide every passenger with a receipt, maintain a passenger log, and operate the vehicle in a "safe and competent manner."

In all instances, i.e., pickups from the airport, hotels, and residences, SuperShuttle sets the fares that customers pay; the fare that appears in the Nextel system is the fare that the franchisee must charge the customer. Franchisees are required to turn in all receipts, trip sheets, and vouchers to SuperShuttle on a weekly basis. SuperShuttle then issues each franchisee a reimbursement check for the fares that he earned in excess of the weekly fees owed to SuperShuttle. (The administration of billing and processing of payments by SuperShuttle is one of the services provided by SuperShuttle pursuant to a franchisee's weekly service payment.)

E. Fares and Payments

The franchisee is entitled to all fares paid by customers and does not share the fare with SuperShuttle in any way. The franchisee's flat weekly fee does not vary with revenues earned. Passengers may pay in the form of credit cards, vouchers, coupons, or cash. Franchisees are required to accept SuperShuttle vouchers. Although the record is unclear as to whether the Company reimburses them for all vouchers in full, it does appear from the testimony that franchisees are reimbursed in full for complimentary rides and hotel coupons.

According to the UFA, franchisees have the option of purchasing an a m., a p m., or a 24-hour license. The testimony, however, reflects that regardless of their license, franchisees are unlimited in the hours during which they can operate.

Franchisees pay their own expenses, which include gas, tolls, licensing fees, and vehicle maintenance.

F. Franchisee Conduct and Termination

The Airport Contract dictates that all franchisees must be dressed in a uniform that clearly identifies them as representatives of SuperShuttle. The Airport Contract includes various general guidelines for franchisee conduct while on the job, including a requirement that franchisees act in a reasonable, courteous, cooperative, and professional manner. The Contract includes prohibitions on, among other things, the use of improper language, loud boisterous conduct, sleeping on the job, soliciting, and consuming any food or drink in plain sight. If a franchisee violates a term of the Airport Contract, the Airport will assess to SuperShuttle liquidated damages,

which are set out in an attachment to the Contract. For instance, if a franchisee is caught sleeping on Airport property, SuperShuttle will be assessed $35 for the second offense, $70 for the third offense, and $105 for subsequent incidents.

The UFA includes a list of 25 examples of conduct for which SuperShuttle can terminate a franchisee without recourse. These include, among other things, unauthorized use of SuperShuttle marks or trade secrets; failure, on more than three occasions within the course of the contract term, to pay fees on a timely basis or comply with a requirement of the UFA; foreclosure on or repossession of the shared-ride vehicle; suspension or termination of any required license or permit; receipt of an excessive number of complaints, citations, or notices; falsification of trip sheets, credit card receipts, or training or driving records; use of a relief driver who does not complete the required training or have the mandatory qualifications; and entrance into an employment relationship or affiliation with a business that is competitive with SuperShuttle. SuperShuttle can also terminate a franchisee for not complying with the UFA or failing to make any payments due to SuperShuttle and failing to cure within 3 days after written notice of default. The UFA also gives SuperShuttle the right to institute a point system, whereby points are assessed to the franchisee every time he fails to comply with rules, and accumulation of points may result in fines and termination. There is no evidence that SuperShuttle has implemented a points-based progressive discipline system.

G. Additional Terms and Conditions

The UFA requires that the signer of the document (i.e., the franchisee) be the principal driver of the vehicle and that the operation of the vehicle must be under his direct supervision. The franchisee may use a substitute driver or relief driver, provided that written notice is provided to SuperShuttle; the substitute driver is an employee, agent, shareholder or partner of the franchisee; the substitute driver completes the required training program; and the substitute driver meets SuperShuttle's other criteria for driver eligibility. General Manager Harcrow testified that SuperShuttle is otherwise not involved in the arrangement between the franchisee and the relief driver. The franchisee and relief driver enter into an agreement that governs their relationship, setting forth when the relief driver will work, what he will be paid, and other terms and conditions of their arrangement. At the time of the hearing, one franchisee employed a relief driver. Franchisees do not have the right to subfranchise.

The UFA includes detailed rules and procedures that a franchisee must follow if he wishes to transfer, assign or sell his franchise to another individual. The franchisee must first notify SuperShuttle in writing of the proposed transfer, setting forth the name and address of the proposed transferee and the purchase price and payment terms of the offer. SuperShuttle has a first right of refusal, under which it can notify the franchisee within 30 days that it wishes to accept the transfer for itself at the price and terms in the notice. If SuperShuttle declines, the UFA states that SuperShuttle "shall not unreasonably withhold consent to any transfer" if certain enumerated conditions are met. These include, among other things, that all of the franchisee's outstanding obligations to SuperShuttle have been satisfied; that the proposed transferee is "of good moral character, and possesses the business experience and capability, credit standing, driving record, health and financial resources necessary to successfully operate Franchisee's business in accordance with the terms of this Agreement"; that the transferee will execute the standard form of the UFA; that the franchisee must reimburse SuperShuttle for its costs in providing training to the transferee and for evaluating and processing the transfer, including legal and administrative fees; and that before the closing, the franchisee pay a transfer fee to SuperShuttle of the lesser of $500 or 10 percent of the sale price. Vice President Robertson testified that there were two franchise assignments at SuperShuttle DFW in 2009.

SuperShuttle does not provide to franchisees any fringe benefits, sick leave, vacation time, or holiday pay. In addition, SuperShuttle does not withhold taxes for franchisees. The Airport Contract requires SuperShuttle to have all franchisees covered under its insurance policy; specifically, SuperShuttle's insurance policy must provide combined single limits of liability for bodily injury and property damage of no less than $500,000 for each occurrence for each vehicle. The UFA provides that the franchisee will reimburse SuperShuttle for the insurance that it provides at a cost of between $125 and $200 per week.

Finally, the UFA requires that franchisees agree to indemnify SuperShuttle and hold it harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act."

III. THE ACTING REGIONAL DIRECTOR'S DECISION AND THE CONTENTIONS OF THE PARTIES AND AMICUS ON REVIEW

The Acting Regional Director found that SuperShuttle met its burden of establishing that the franchisees are independent contractors and not employees under Section 2(3) of the Act. Citing the Board's decision in *Roadway Package System, Inc.*, 326 NLRB at 842, the Acting Regional Director applied the common-law agency test and assessed "all incidents of the parties' relation-

ship." In so doing, she noted that, in cases involving the taxicab industry, the Board has given significant weight to two factors: "the lack of any relationship between the company's compensation and the amount of fares collected," and "the company's lack of control over the manner and means by which the drivers conduct business after leaving the [company's] garage." *AAA Cab Services*, 341 NLRB at 465 (citations omitted). Accordingly, the Acting Regional Director emphasized that here, (1) franchisees do not share fares with SuperShuttle, and (2) franchisees operate their vehicles with little control by SuperShuttle. In so finding, the Acting Regional Director noted that the franchisees "are free to work if they want and when they want, and have total autonomy in this respect." Although the Acting Regional Director acknowledged some evidence of control by SuperShuttle—including its imposition of fare amounts, its dress requirements, and its installation of GPS tracking devices—she concluded that SuperShuttle does not exercise control "over the manner and means" by which the franchisees conduct the actual business of transporting customers.

In finding independent-contractor status, the Acting Regional Director also assigned significance to the franchisees' ownership of their vehicles and their "opportunities for loss or gain." To this end, the Acting Regional Director found that franchisees face a meaningful risk of loss in light of the substantial costs that go into owning a franchise, i.e., vehicle payments, weekly system fees, insurance costs, gas, maintenance, licensing fees, and tolls. The Acting Regional Director also found that franchisees "make calculated choices between which trips to choose," noting that, because franchisees pay for the costs of operating their vans, their decisions in choosing trips affect profit margins. She also stated that "a driver's determination of when and how much he will work impacts his profit margin. All drivers take similar risks, but by their decisions and efforts, they do not all achieve the same profits." Finally, she noted that franchisees can hire a relief driver, which creates the "potential to generate more gross revenue while spending less time driving when a relief driver is hired."[13]

The Union contends that, on review, the Board should find that the franchisees are employees. Contrary to the Acting Regional Director, the Union argues that SuperShuttle "exercises substantial control over the drivers' daily performance." For example, the Union emphasizes that SuperShuttle unilaterally promulgates the UFA, requires that franchisees display the SuperShuttle logo on their vehicles, imposes strict rules regarding uniforms and appearance, requires franchisees to attend training, can fine franchisees if they decline certain mandatory assignments, can unilaterally change the type of van that franchisees are permitted to use, and can discipline and terminate franchisees for various transgressions. The Union also notes that franchisees perform a regular and essential part of SuperShuttle's business; are prohibited from working for SuperShuttle's competitors; play no role in soliciting passengers and arranging pickups; do not have any special skills or expertise; must acquire Nextel systems, logo decals, and uniforms from SuperShuttle; and are not permitted to modify fares to get more business. As to entrepreneurial opportunities, the Union notes that franchisees are not permitted to operate more than one route or vehicle, and that franchisees' ability to assign or sell the routes is constrained by the terms of the UFA.

SuperShuttle agrees with the Acting Regional Director's holding that the franchisees are independent contractors. In addition to the factors that the Acting Regional Director addressed, SuperShuttle argues that State regulatory control over the franchisees, which is effectuated through the Airport Contract, is more extensive than set forth in the decision. Specifically, it states that the Airport Contract requires franchisees to wear a uniform, keep records, and submit vehicles for inspection. Accordingly, such requirements are evidence of control by the State, not SuperShuttle. SuperShuttle also emphasizes that franchisees have "unfettered entrepreneurial freedom," as evidenced by their complete control over selecting bids, setting hours, and selecting the type of work they do. SuperShuttle also points to franchisees' substantial investment in their vans and associated business costs, as well as the fact that the parties agreed to enter an independent-contractor relationship, in which franchisees can incorporate as independent entities. Finally, SuperShuttle does not provide benefits or withhold taxes.

IV. DISCUSSION

A. Overruling the Board's FedEx Decision

The Board majority's decision in *FedEx* did far more than merely "refine" the common-law independent-contractor test—it "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency." *FedEx Home Delivery*, 361 NLRB at 629

[13] Although the Acting Regional Director made fact findings regarding the Airport Contract, the existence of regulatory control by the Airport Board did not factor heavily in her analysis or her conclusion that the franchisees were independent contractors.

(Member Johnson, dissenting). Today, we overrule this purported "refinement."[14]

The *FedEx* Board begins its alteration of the independent-contractor test with a classic straw-man analysis of the D.C. Circuit's description of entrepreneurial opportunity in *FedEx I*. As previously stated, the court, following its review of the Board's and the court's independent-contractor jurisprudence, concluded that, "while all the considerations of common law remain in play, an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism." *FedEx I*, 563 F.3d at 497. This statement of the law is fully consistent with Board precedent and affirms that all the common-law factors "remain in play." But the *FedEx* Board majority, in its attempt to discredit the court's analysis of whether the common-law factors demonstrate that the drivers possess entrepreneurial opportunity, inflated the court's holding, finding that the court "treats the existence of 'significant entrepreneurial opportunity' as the *overriding consideration* in all but the clearest cases" and as the "*single animating principle* in the inquiry." 361 NLRB at 617–618 (emphasis added). Relying on this hyperbolic misreading of the court's description of entrepreneurial opportunity, the Board purported to "refine" the independent-contractor test by confining the significance of entrepreneurial opportunity to "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." Id. at 620 (emphasis in original). Thus, rather than considering the entrepreneurial opportunity, if any, afforded a putative contractor by the common-law factors, the Board limited that inquiry to a single aspect of a newly coined factor, thereby altering the test and greatly diminishing the significance of entrepreneurial opportunity to the analysis.

Contrary to the *FedEx* Board majority's and our dissenting colleague's claim that entrepreneurial opportunity was the *FedEx I* court's "overriding consideration," the court noted that an emphasis on entrepreneurial opportunity "does not make applying the test mechanical." 563 F.3d at 497. Indeed, the court applied and considered all of the relevant common-law factors, including whether the parties believe they are creating a master/servant relationship, the extent of the employer's control over details of the work, the extent of employer supervision, and who supplies the instrumentalities for doing the work, before concluding that, "on balance, . . . they favor independent contractor status." Id. at 504. See also *FedEx II*, 849 F.3d at 1128 (rejecting Board majority's contention that the *FedEx I* court did not consider and weigh all common-law factors).

In sum, we do not find that the *FedEx I* court's decision departed in any significant way from the Board's traditional independent-contractor analysis, and we therefore find that the *FedEx* Board's fundamental change to the common-law test in reaction to the court's decision was unwarranted. The court acknowledged that "the ten-factor test is not amenable to any sort of bright-line rule" and that "'there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" 563 F.3d at 496 (quoting *United Insurance Co.*, 390 U.S. at 258). The court followed that guidance. The court further noted that the Board's and the court's evolving emphasis on entrepreneurial opportunity was a "subtle refinement . . . done at the Board's urging," and it reiterated that "all the considerations at common law remain in play." Id. at 497. Thus, no "refinement" of the court's analysis was required. Indeed, while courts afford the Board substantial deference in matters requiring application of special expertise when interpreting the Act, "a determination of pure agency law involve[s] no special administrative expertise that a court does not possess." *United Insurance Co.*, 390 U.S. at 991. As the D.C. Circuit pointedly remarked in *FedEx II* when rejecting the Board's deference argument in support of the *FedEx* majority standard at issue here, "We do not accord the Board such breathing room when it comes to new formulations of the legal test to be applied." 849 F.3d at 1128.

Moreover, we reject the characterization of the *FedEx* decision as mere "refinement" because, as former Member Johnson explained in detail in his dissent in *FedEx,* the majority shifted the independent-contractor test to one of "economic dependency," a test that was specifi-

[14] We do not suggest that the Board cannot refine or clarify its independent-contractor analysis, as it did in *Roadway* and as we do here today. Instead, we find that the *FedEx* majority's purported "refinement" was an impermissible (or at least an unwarranted) diminution of the importance of entrepreneurial opportunity for the reasons discussed below.

Our dissenting colleague complains that the Board is overruling precedent here without public notice and an invitation to file briefs. We dismiss this claim for several reasons. First, the *FedEx* majority promulgated its "refinement" to the independent-contractor test without public notice or invitation to file briefs. Our decision here to undo this refinement, by the *FedEx* majority's own example, requires no such action. Second, as the Board has noted, it has on many occasions overruled or modified precedent without supplemental briefing. See, e.g., *The Boeing Co.*, 365 NLRB No. 154, slip op. at 21 (2017), and cases cited. Finally, to the extent *FedEx* represents precedent, it is, at 4 years old, hardly "longstanding."

cally rejected by Congress.[15] *FedEx Home Delivery*, 361 NLRB at 629–634 (Member Johnson, dissenting). In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the Supreme Court articulated a policy-based economic realities test for determining independent-contractor status in cases involving New Deal social legislation. As the Court explained in *U.S. v. Silk*, 331 U.S. 704 (1947),

> [t]he problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, 29 U.S.C.A. s 151 et seq., we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, s 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."[16]

In the Taft-Hartley amendments of 1947, Congress reacted to this expansive alternative to the common-law test by specifically excluding independent contractors from coverage under the Act. In subsequent cases, the Supreme Court recognized that Congress had effectively abrogated the holdings of *Hearst* and *Silk* to the extent they authorized policy-based alternatives to the common-law agency test of employee and independent-contractor status in the absence of express statutory language. See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324–325 (1992) ("In each case, the Court read 'employee' to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning."). In short, the *FedEx* majority's reformulation of the independent-contractor analysis impermissibly revives an "economic dependency" standard that Congress has explicitly rejected.

In addition, the *FedEx* majority's emphasis on drivers' "economic dependency" on the employer makes no meaningful distinction between FedEx drivers and any sole proprietor of a small business that contracts its services to a larger entity. Large corporations such as FedEx or SuperShuttle will always be able to set terms of engagement in such dealings, but this fact does not necessarily make the owners of the contractor business the corporation's employees.

Properly understood, entrepreneurial opportunity is not an independent common-law factor, let alone a "superfactor" as our dissenting colleague claims we and the D.C. Circuit treat it. Nor is it an "overriding consideration," a "shorthand formula," or a "trump card" in the independent-contractor analysis. Rather, as the discussion below reveals, entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa. Moreover, we do not hold that the Board must mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case. Instead, consistent with Board precedent as discussed below, the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.[17]

[15] *United Insurance Co.*, 390 U.S. at 256. The *FedEx* majority's limitation of the significance of entrepreneurial opportunity to a single aspect of whether the contractor rendered services as part of an independent business derived directly from former Member Liebman's dissent in *St. Joseph News-Press*, 345 NLRB at 484 (Member Liebman, dissenting), where she wrote: "[I]t is entirely appropriate to examine the economic relationship between the [r]espondent and the carriers to determine whether the carriers are economically independent business people, or substantially dependent on the [r]espondent for their livelihood." Notably, the *FedEx* majority overruled *St. Joseph News-Press* "as inconsistent with the view articulated today." 361 NLRB at 621.

[16] 331 U.S. at 713.

[17] Our dissenting colleague claims that we insist that we are "free to adjust [our] test whenever and however [we] like." To the contrary, we simply observe that the Board will not mechanically apply the principle

The Board has long considered entrepreneurial opportunity as part of its independent-contractor analysis.[18] But, as the D.C. Circuit has recognized, the Board has over time (particularly since *Roadway*) shifted its perspective to entrepreneurial opportunity as a principle by which to evaluate the significance of the common-law factors, as demonstrated by the nonexhaustive discussion of relevant Board precedent that follows.

In *Roadway*, the Board, in finding that the disputed drivers were employees rather than independent contractors, devoted much of its analysis section to the evaluation of how certain common-law factors limited the drivers' entrepreneurial opportunity for gain or loss. See 326 NLRB at 851–853. For example, the Board found that obstacles created by the employer through its demanding schedules for the drivers and detailed specifications for the drivers' trucks effectively prevented drivers from taking on additional business during their off hours and therefore limited the "entrepreneurial independence" that ownership of their trucks may have otherwise provided them. See id. at 851 & fn. 36 ("[The employer] has simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities."). In addition, the Board found that the drivers' ability to increase their "entrepreneurial profit" through their own "efforts and ingenuity" was limited by the employer's control over their routes, the number of packages and stops on their routes, and the prices charged to customers, and that the employer's compensation system provided "an important safety net for the fledging driver to shield him from loss." See id. at 852–853. Finally, the Board found that the employer's "considerable control" over the drivers' ability to sell their routes limited the possibility of the drivers "influenc[ing] their profits like entrepreneurs" through their proprietary interests in their routes.[19]

In other cases, the Board has found that certain common-law factors significantly supported independent-contractor status because they provided workers with the entrepreneurial opportunity for gain or loss. In *Dial-A-Mattress*, the companion case to *Roadway*, the Board, in finding that the drivers were independent contractors, emphasized that the drivers had significant entrepreneurial opportunity for gain or loss where they could own multiple trucks and hire their own employees without being subject to control or requirements of the employer, they were not guaranteed minimum compensation, they could decline orders, and they were not required to provide delivery services on every workday. See 326 NLRB at 891. In *St. Joseph News-Press*, the Board found that the conditions "enabl[ed] carriers to take economic risk and reap a corresponding opportunity to profit from working smarter, not just harder" where the carriers could hire full-time substitutes over whom they had complete control, hold contracts on multiple routes, deliver other products (including for competitors) while making deliveries for the employer, and solicit new customers. See 345 NLRB at 479 (internal quotations omitted).[20]

Our dissenting colleague argues that the Board has merely considered the presence of entrepreneurial opportunity as an aspect of the "method of compensation" factor when citing it in support of an independent-contractor finding and has generally cited the absence of entrepreneurial opportunity as support for finding employee status. As demonstrated by the discussion above, however,

of entrepreneurial opportunity where it does not apply, i.e., when the factual circumstances of a case render entrepreneurial opportunity irrelevant to a particular common-law factor or factors. But, in every case, the Board will evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain.

[18] See, e.g., *Roadway Package System*, 288 NLRB 196, 198 (1988) (*Roadway I*) (finding that the drivers "[bore] few of the risks and enjoy[ed] little of the opportunities for gain associated with an entrepreneurial enterprise" where the employer controlled the number of packages and stops for each driver and their service areas, did not give drivers a proprietary interest in their service areas, and utilized a compensation system that effectively balanced the drivers' incomes); *Standard Oil Co.*, 230 NLRB 967, 971 (1977) (finding that the employer controlled "all meaningful decisions of an entrepreneurial nature which affect profit or risk of loss" where the employer unilaterally determined the drivers' compensation and delivery territories, the prices of the products, and the customers to whom they could deliver).

[19] See also *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000) (finding that the drivers had "no significant opportunity for entrepreneurial gain or loss" where the employer determined the routes, the base pay, and the amount of freight on each route, and did not allow the drivers to add or reject customers), enfd. 292 F.3d 777 (D.C. Cir. 2002); *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000) (finding that the drivers did "not have a significant entrepreneurial opportunity for financial gain or loss" where the employer controlled the drivers' rates of compensation and the prices charged to the customers, and that despite the "theoretical potential for entrepreneurial opportunity" that came with the drivers' ability to hire their own drivers, the evidence did not demonstrate any resulting "economic gain" given the employer's control).

[20] See also *Arizona Republic*, 349 NLRB 1040, 1044–1045 (2007) (finding that the carriers had entrepreneurial potential to increase their income where they could use full-time substitutes, hold contracts on multiple routes, deliver other newspapers, negotiate the piece rate for delivering the employer's newspaper, solicit new customers, and receive tips); *Argix Direct, Inc.*, 343 NLRB 1017, 1020–1021 (2004) (finding that some of the employer's drivers were entrepreneurs who owned multiple trucks and hired their own drivers and that all of the drivers could "choose to maximize or minimize their income" because they set their own schedules and therefore chose when and when not to work).

the Board has never thus limited its consideration of entrepreneurial opportunity but has evaluated a number of other common-law factors to determine whether workers in a given case were provided opportunities for economic gain.

Moreover, we reject our colleague's suggestion that the Board has not previously evaluated entrepreneurial opportunity in a manner consistent with our decision today. Rather, as discussed above, the Board has found that specific common-law factors may or may not demonstrate entrepreneurial opportunity depending on the overall circumstances of the case.[21] Going forward, we will continue to consider how the evidence in a particular case, viewed (as it must be) in light of all the common-law factors, reveals whether the workers at issue do or do not possess entrepreneurial opportunity.[22] Our cases simply do not support the *FedEx* majority's or our dissenting colleague's attempt to cabin consideration of entrepreneurial opportunity to one aspect of a single factor.

As a more general matter, our dissenting colleague claims that our approach is inconsistent with the common-law agency test. In support, she argues that "if the common-law agency test has a core concept, it is . . . 'control.'" However, as she acknowledges, the *Roadway* Board rejected the "proposition that those factors which do not include the concept of 'control' are insignificant when compared to those that do." 326 NLRB at 850. Moreover, the Restatement expressly recognizes that a master-servant relationship can exist in the absence of the master's control over the servant's performance of work. See Restatement (Second) of Agency § 220 cmt. d ("[T]he full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking."). But most importantly, the Board's subtle shift in emphasis from control to entrepreneurial opportunity, which the D.C. Circuit first recognized and we explicitly acknowledge today, did not fundamentally alter the Board's independent-contractor analysis. As stated, control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other. Indeed, entrepreneurial opportunity often flowers where the employer takes a "hands off" approach. At the end of the day, the Board has simply shifted the prism through which it evaluates the significance of the common-law factors to what the D.C. Circuit has deemed a "more accurate proxy" to "'capture[] the distinction between an employee and an independent contractor.'" See *FedEx I*, 563 F.3d at 497 (citing *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (2002)). As the D.C. Circuit has made clear, the Board's independent-contractor analysis is qualitative, rather than strictly quantitative; thus, the Board does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case. See *FedEx I*, 563 F.3d at 497 fn. 3. Where a qualitative evaluation of common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor.

Our dissenting colleague further claims that our approach is inconsistent with the Supreme Court's decision in *United Insurance*. To the contrary, we will continue to adhere, as we must, to the Court's decision, considering all of the common-law factors in the total factual context of each case and treating no one factor (or the principle of entrepreneurial opportunity) as decisive. And where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, we will likely find independent-contractor status. Thus, our approach is faithful to *United Insurance* and the common-law agency test that it requires.[23]

In conclusion, we find that the Board majority in *FedEx*, based on a mischaracterization of the D.C. Circuit's opinion in *FedEx I*, impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial

[21] For example, in some cases, vehicle ownership provides the driver with significant entrepreneurial opportunity. *Dial-a-Mattress*, supra. Under other facts, vehicle ownership provides no such opportunity. *Roadway*, supra.

[22] We acknowledge that the Board's precedent in this area, like in many areas, has not been entirely consistent. See *FedEx I*, 563 F.3d at 498 ("[T]he Board's language has not been as unambiguous as this court's binding statement."). Today's decision is intended to eliminate any ambiguity over how to treat entrepreneurial opportunity in the Board's independent-contractor analysis in the future.

[23] We do not find our dissenting colleague's citation of *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), to be persuasive because in that case, the court applied the California state law standard for determining employee status, which, as the California Supreme Court has explained, is "not inherently limited by common law principles" but, rather, "must be construed with particular reference to the history and fundamental purposes of the statute." *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399, 405 (Cal. 1989) (internal quotations omitted); see also *Alexander*, 765 F.3d at 992 ("The *Borello* court noted that the '"control-of-work-details" test for determining [employee status] must be applied with deference to the purposes of the protective legislation.'") (quoting *Borello*, 769 P.2d at 406) (alteration in *Alexander*); *FedEx Home Delivery*, 361 NLRB at 631 fn. 11 (Member Johnson, dissenting) (explaining that while the California standard considers secondary indicia that overlap with the common-law factors in the Restatement, it is not the equivalent of the common-law test that the Board must apply but is, instead, "a variant of the policy-based economic realities test of *Hearst* [and] *Silk*").

opportunity to the analysis. We therefore overrule the Board's *FedEx* decision and return the Board's independent-contractor test to its traditional common-law roots.

B. Applying the Common-Law Factors

Applying the Board's traditional common-law factor test to the facts of this case, we find, in agreement with the Acting Regional Director, that SuperShuttle franchisees are independent contractors. Like most entrepreneurs or small business owners, SuperShuttle franchisees make a significant initial investment in their business by purchasing or leasing a van and entering into a Unit Franchise Agreement that requires certain payments, including an initial fee and a weekly flat fee. Like small business owners, franchisees have nearly unfettered opportunity to meet and exceed their weekly overhead: with total control over their schedule, they work as much as they choose, when they choose; they keep all fares they collect, so the more they work, the more money they make; and they have discretion over the bids they choose to accept, so they can weigh the cost of a particular trip (in terms of time spent, gas, and tolls) against the fare received. As explained in more detail below, these factors (i.e., extent of control by employer, method of compensation, and ownership of principal instrumentality), which demonstrate that the franchisees have significant opportunity for economic gain and significant risk of loss, strongly support finding independent-contractor status, and they are not outweighed by any countervailing factors supporting employee status.

i. Extent of control by the employer

As the Acting Regional Director found, the Board has held that the control exerted by an employer "over the manner and means by which drivers conduct[] business" is one of two factors given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB at 465. Stated differently, the fact that an employer does not exercise control over the manner and means by which drivers conduct business may reliably signal the existence of significant entrepreneurial opportunity. We agree with the Acting Regional Director's finding that the shared-ride industry is an extension of the taxicab industry and that this factor should be afforded significant weight.

As noted above, SuperShuttle franchisees are free from control by SuperShuttle in most significant respects in the day-to-day performance of their work. Franchisees have total autonomy to set their own work schedule. They merely turn on their Nextel device and wait for the next bid offer. Once a trip is offered, franchisees, except in very limited circumstances,[24] can decide whether to accept the trip or not. Further, when a franchisee wishes to take a break or end the work day, he merely turns off his Nextel device. Other than the receipt of data from the Nextel device, there is little record evidence of communication between a franchisee and SuperShuttle during day-to-day operations. Franchisees' discretion in deciding when to work and which trips to accept weighs in favor of independent-contractor status. *AAA Cab Services*, 341 NLRB at 465.[25]

In addition, franchisees are largely free to choose where they work. Although they are practically limited to the Dallas-Fort Worth area, SuperShuttle does not impose any restrictions or control over where franchisees work within that area. Franchisees have no set routes and are not confined to any specific region of the Dallas-Fort Worth area. Thus, the absence of control over franchisees' routes affords franchisees considerable opportunity and independence during those times they choose to work. This geographic freedom is indicative of independent-contractor status. Id.

Franchisees are required under the UFA to indemnify SuperShuttle and hold it harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act." Such indemnification greatly lessens SuperShuttle's motivation to control a franchisee's actions, since SuperShuttle is not liable for a franchisee's negligent or intentionally harmful acts. This fact weighs in favor of independent-contractor status. *Dial-A-Mattress*, 326 NRLB at 891 ("[I]n employment relationships, employers generally assume the risk of third-party damages, and do not require indemnification from their employees.").[26]

[24] The record indicates that franchisees can be asked to bid on a trip that no one else has accepted. The Petitioner presented evidence that, in *one* instance, a trip was forced into a franchisee's Nextel and that when the franchisee refused the trip, he was fined $50.

[25] In an effort to minimize the franchisees' freedom to choose when they work, how long they work, and which trips they accept, our dissenting colleague makes much of the fact that the franchisees must use the Nextel device to accept trips. However, the Nextel device does not allow SuperShuttle to exercise control over the franchisees. Instead, it is simply the mechanism that SuperShuttle uses to transfer the passengers' trip reservations to the franchisees. Without such a transfer mechanism, SuperShuttle's operation would be all for naught, as the franchisees would not know who to pick up, when and where to pick them up, and where to take them. Because the franchisees decide when to turn on the Nextel device and what trips to accept, the Nextel device does not allow SuperShuttle to control their work.

[26] Our dissenting colleague distinguishes the present case from *Dial-A-Mattress* by pointing out that the Airport Contract requires SuperShuttle to have all franchisees covered under its insurance policy. While that is correct, it proves nothing because the Airport Contract does not require that SuperShuttle have the franchisees agree to indem-

Although franchisees enjoy broad latitude in controlling their daily work, they are subject to certain requirements. The Airport Contract requires franchisees to wear a uniform and maintain certain grooming standards. Franchisees must display the SuperShuttle decals and markings on their vans, and they must maintain the interior condition of the vans, including the number of seats. DFW Airport has the right to inspect vans operated by SuperShuttle and to audit SuperShuttle's compliance with the Airport Contract. But these requirements are not evidence of SuperShuttle's control over the manner and means of doing business because they are imposed by the state-run DFW Airport. *AAA Cab Services*, 341 NLRB at 465; *Don Bass Trucking Co.*, 275 NLRB 1172, 1174 (1985) ("Government regulations constitute supervision not by the employer but by the state.") (internal citations omitted). Thus, these controls do not mitigate the substantial weight of the factors supporting independent-contractor status.

Fares received by franchisees are set by SuperShuttle,[27] and franchisees must accept vouchers and coupons. SuperShuttle requires more frequent vehicle inspections than the Airport Contract, and franchisees are required to display a "How am I driving?" sticker on their vehicle. SuperShuttle also requires some additional training. However, we find that these limited employer controls are vastly outweighed by the general control that franchisees have over their working conditions, including scheduling and selecting bids.[28] In short, this factor weighs heavily in favor of independent-contractor status.

ii. Method of payment

The method of payment is the second factor to which the Board has traditionally given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB at 465; *Elite Limousine Plus*, 324 NLRB at 1001. As noted above, franchisees pay a monthly flat fee pursuant to the UFA, and their monthly fee does not vary based on revenues earned. They are entitled to all fares they collect from customers, and they do not share the fares in any way with SuperShuttle. When an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work. *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1309–1310 (2004). Moreover, the franchisees' freedom to keep all fares they collect, coupled with their unfettered freedom to work whenever they want, provides them with significant entrepreneurial opportunity. Thus, the Board has found that "the lack of any relationship between the company's compensation and the amount of fares collected" supports a finding that franchisees are independent contractors.

iii. Instrumentalities, tools, and place of work

The primary instrumentalities of franchisees' work are their vans and the Nextel dispatching system. As noted, franchisees purchase their vans, an investment of $30,000 or more, or they lease their vans, also a significant investment. The Nextel devices are a part of the franchise agreement, and franchisees pay for them as part of their weekly fee. In addition, franchisees pay for gas, tolls, repairs, and any other costs associated with operating their vans. Franchisees' full-time possession of their vans facilitates their ability to work whenever and wherever they choose.[29] These factors weigh in favor of independent-contractor status.

iv. Supervision

Franchisees are not generally supervised by SuperShuttle. The evidence shows that the only daily communication between SuperShuttle and the franchisees occurs through the Nextel dispatch system. Because franchisees have the right to accept or decline any bid, SuperShuttle, through the Nextel system, does not "assign" routes to franchisees or perform any other supervisory role. SuperShuttle may fine a franchisee $50 for accepting a bid and then later declining it. The $50 is given to the franchisee who picks up the previously de-

nify it and hold it harmless against any and all liability. The Airport Contract allows for SuperShuttle to assume the risk of third-party damages, and the fact that SuperShuttle shifts that risk to franchisees weighs in favor of independent-contractor status.

[27] As a practical matter, fares are set by the competitive airport transportation market, so even if franchisees could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle's fares.

[28] Our dissenting colleague emphasizes that the UFA requires franchisees "not to deviate from the standards, specifications and operating procedures" in it. However, she has not explained how those "standards, specifications and operating procedures" significantly exceed the requirements in the Airport Contract, which, as government regulations, are not evidence of SuperShuttle's control. As discussed above, the UFA itself states that many restrictions imposed by the Airport Contract are effectively passed along in the UFA. Overall, we simply have not found that the UFA's requirements exceed the requirements of the Airport Contract to such an extent that they outweigh the significant evidence, discussed above, of the franchisees' control over their work.

[29] We acknowledge that the UFA's prohibition on franchisees entering into business relationships with SuperShuttle's competitors limits to some extent the potential for entrepreneurial opportunity that would otherwise come with ownership of their vans. However, that limitation is mitigated by the fact that SuperShuttle does not limit its hours of service and that the franchisees can drive for SuperShuttle whenever and for as long as they choose. Thus, the franchisees do not need the option to work for SuperShuttle's competitors to maximize their entrepreneurial opportunity to the same extent that they would need that option if SuperShuttle's hours of service were limited or if SuperShuttle limited the number of hours that they could drive.

clined trip. There was also evidence that, on one occasion, SuperShuttle forced a trip into a franchisee's Nextel and that, when the franchisee declined the trip, he was fined $50.

Franchisees' near-absolute autonomy in performing their daily work without supervision supports a finding that they are independent contractors. The few minor and isolated fines do not diminish the force of that conclusion.

v. The relationship the parties believed they created

The UFA states unequivocally, in bold, capital letters: **FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR THE CITY LICENCEE.** In Article O of the UFA, "Relationship of Parties," the agreement further states: **IT IS ACKNOWLEDGED THAT THE FRANCHISEE IS THE INDEPENDENT OWNER OF ITS BUSINESS.** These provisions leave little doubt as to the intention of the parties to create an independent-contractor relationship between SuperShuttle and its franchisees.

As the Acting Regional Director found, two other factors support this conclusion. SuperShuttle does not provide franchisees with any benefits, sick leave, vacation time, or holiday pay. Further, SuperShuttle does not withhold taxes or make any other payroll deductions from franchisees' pay. Finally, the record shows that five franchisees entered into the franchise agreement as corporations. Such a relationship is rare in employer-employee relationships and is associated with independent-contractor status. In short, this factor supports finding that franchisees are independent contractors.

vi. Engagement in a distinct business; work as part of the employer's regular business; the principal's business

As the Acting Regional Director noted, these three factors are closely related. Certain specialized occupations are commonly performed by individuals in business for themselves, and workers in such occupations are usually deemed independent contractors. In this case, driving is not considered a distinct occupation. In addition, SuperShuttle is clearly involved in the business of transporting customers, and its revenue comes from providing that service. Thus, these related factors weigh in favor of employee status.

vii. Length of employment

Generally, a longer employment relationship indicates employee status. In this case, the Unit Franchise Agreement is a one-year contract. On this basis, the Acting Regional Director found that this factor favored independent-contractor status. Although the UFA is a one-year contract, the evidence shows that most franchisees renew their agreements yearly. Under these circumstances, we find that this factor is neutral.

viii. Skills required

As the Acting Regional Director found, the record does not indicate that franchisees have any particular skill or require any specialized training. This factor favors finding employee status. *Prime Time Shuttle International*, 314 NLRB 838, 840 (1994).

C. Conclusion

Having considered all of the common-law factors, we find, in agreement with the Acting Regional Director, that SuperShuttle established that its franchisees are independent contractors. Franchisees' ownership (or lease) and control of their vans, the principal instrumentality of their work, the nearly complete control franchisees exercise over their daily work schedules and working conditions, and the method of payment, where franchisees pay a monthly fee and keep all fares they collect, all weigh strongly in favor of independent-contractor status. Moreover, these three factors provide franchisees with significant entrepreneurial opportunity and control over how much money they make each month. Further, we emphasize again that the shared-ride industry is an extension of the taxicab industry,[30] and that in taxicab cases, the Board has particularly focused on the company's "control over the manner and means by which the drivers conduct[] business" and "the relationship between the company's compensation and the amounts of fares collected." *AAA Cab Services*, 341 NLRB at 465 (citing *Elite Limousine Plus*, 324 NLRB at 1001); *City Cab Co.*, 285 NLRB at 1193.[31] Thus, our findings that SuperShuttle has little control over the means and manner of the franchisees' performance while they are actually driving and that SuperShuttle's compensation is not related at all to the amounts of fares collected by the franchisees, and conversely, that these facts provide franchisees with significant entrepreneurial opportunity, strongly point toward independent-contractor status. In addition, the absence of supervision of franchisees and the understanding between parties that franchisees are independent operators, as clearly expressed in the Unit Franchise Agreement, also weigh in favor of independent-contractor status. Although the skill required as a franchisee, the fact that driving is not a distinct occupation, and SuperShuttle's involvement in the business all weigh in favor of employee status, we agree with the Acting Regional Director that these factors are relatively less

[30] Our dissenting colleague does not dispute this finding.

[31] Our dissenting colleague does not dispute or take issue with this taxicab precedent.

significant and do not outweigh those factors that support independent-contractor status.

ORDER

The petition is dismissed.

Dated, Washington, D.C. January 25, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Until 2005, SuperShuttle DFW treated its drivers as employees. It then implemented a franchise model, supposedly transforming the drivers into independent contractors. Today, the majority finds that this initiative succeeded, at least for purposes of the National Labor Relations Act. To reach that finding, the majority wrongly overrules the Board's 2014 *FedEx* decision,[1] without public notice and an invitation to file briefs.[2] But under any reasonable interpretation and application of the common-law test for determining employee status—which everyone agrees is controlling—the SuperShuttle drivers are, in fact, employees. The drivers perform work that is the core part of SuperShuttle's business, subject to a nonnegotiable "unit franchise agreement" that pervasively regulates their work; they could not possibly perform that work for SuperShuttle without being completely integrated into SuperShuttle's transportation system and its infrastructure; and they are prohibited from working for any SuperShuttle competitor. SuperShuttle's drivers are not independent in any meaningful way, and they have little meaningful "entrepreneurial opportunity." Under well-established Board law—reflected in decisions leading up to and including *FedEx*—this should be a straightforward case.

Instead, purporting to "return the Board's independent-contractor test to its traditional common-law roots," the majority not only reaches the wrong result here, but also adopts a test that cannot be reconciled with either the common law or Supreme Court and Board precedent. According to the majority, the Board is required to apply the multi-factor, common-law agency test of employee status, as articulated in the *Restatement (Second) of Agency* §220 (1958), yet, at the same time, the majority insists that "entrepreneurial opportunity . . . has always been at the core of the common law test" and thus the Board must treat "entrepreneurial opportunity" as "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Simply put, these two requirements are contradictory: "entrepreneurial opportunity" is demonstrably *not* "at the core of the common law test."

Indeed, the majority does not coherently apply the test it claims to adopt in actually deciding this case. Instead, the majority insists that it is free to adjust its test whenever and however it likes, observing that "the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." As the Supreme Court has told the Board, however, the reasoned decision making required by the Administrative Procedure Act means that federal agencies may not announce one rule but apply another.[3] That seems to be the path the majority has chosen today.

I.

[1] *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017).

[2] The current majority has routinely broken with established Board practice in this respect, at the cost of public participation and fully-informed decision making. See, e.g., *The Boeing Co.*, 365 NLRB No. 154, slip op. at 31–33 (2017) (dissenting opinion).

The majority explains its failure to provide notice and an opportunity for briefing by pointing out that the *FedEx* Board did not invite briefs either. I was not a Board member when *FedEx* was decided. It is worth noting, however, that at the time, the Board effectively was required to address the District of Columbia Circuit's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009), because every reviewable Board decision may be challenged in that court. See National Labor Relations Act, Sec. 10(f), 29 U.S.C. §160(f). Thus—in contrast to today's out-of-the-blue ruling—the Board's refinement of independent-contractor doctrine in the *FedEx* decision could easily have been anticipated, and amicus participation sought.

Insofar as the majority suggests that a Board decision issued without notice and an invitation to file briefs may be overruled the same way, its own reversals of precedent are vulnerable. This prospect, of course, only shows that institutional norms, once broken, may be hard to fix.

[3] *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 374–375 (1998). As the Supreme Court explained there:

> Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel . . . and effective review of the law by the courts.

Id. at 375.

Assessing the majority's decision here first requires understanding its legal background, as well as carefully analyzing what the Board actually said and did in the 2014 *FedEx* decision. I address each point in turn.

A. The Common-Law Origins of the Employee/Independent Contractor Test

Section 2(3) of the National Labor Relations Act excludes independent contractors, as opposed to employees, from statutory coverage.[4] The starting point for independent-contractor determinations under the National Labor Relations Act is the Supreme Court's decision in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). There, the Court held that the Act incorporated the "common law agency test in distinguishing an employee from an independent contractor." 390 U.S. at 256. Upholding the Board's determination that insurance-company "debit agents" were statutory employees (and reversing the Seventh Circuit's contrary determination), the Court explained that:

> There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. . . .
>
> . . . .
>
> *There is no shorthand formula or magic phrase that can be applied to find the answer*, but all of the incidents of the relationship must be assessed and weighed *with no one factor being decisive.* What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

Id. at 258 (footnote omitted; emphasis added).

In later decisions involving application of the common-law agency test to employee-status determinations under federal statutes, the Supreme Court has consistently been guided by the multifactor test articulated in Section 220 of the *Restatement (Second) of Agency*, which addresses the tort liability of "masters" for the actions of their "servants."[5] See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (applying Employee Retirement Income Security Act). The *Restatement* notes that "[u]nder the existing regulations and decisions involving the Federal [sic] Labor Relations Act, there is little, if any, distinction between employee and servant as here used."[6] No Supreme Court decision has cast doubt on the continuing viability of *United Insurance* or the later cases that look to the *Restatement* for authoritative guidance.

The Board's seminal independent-contractor case is *Roadway Package System*, 326 NLRB 842 (1998), a unanimous full-Board decision[7] that, not surprisingly, endorsed the use of the open-ended, multifactor *Restatement* test. There, relying heavily on the Supreme Court's decision in *United Insurance*, the Board (1) rejected the

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[4] Sec. 2(3) provides that "[t]he term 'employee' shall include any employee . . . but shall not include … any individual having the status of an independent contractor." 29 U.S.C. §152(3).

[5] Under Sec. 219(1) of the *Restatement*, a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Sec. 220(1) provides that "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Sec. 220(2), in turn, identifies a long list of factors to be considered "[i]n determining whether one acting for another is a servant or an independent contractor." It provides that:

> [T]he following matters of fact, *among others*, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

(emphasis added).

[6] *Restatement (Second) of Agency* §220, comment g. The focus of the *Restatement*, of course, is the common-law liability of employers ("masters") for torts committed by their employees ("servants"), not issues of federal statutory coverage turning on employee status or the existence of an employment relationship. As the *Restatement* explains:

> The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally.
>
> . . . .
>
> [W]ith the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit. As a result of these considerations, historical and economic, the courts of today have worked out tests which are helpful in predicting *whether there is such a relation between the parties that liability will be imposed upon the employer for the employee's conduct which is in the scope of employment*.

Id., §219, comment a (emphasis added).

[7] Four of the Board's five members participated; the remaining member was recused. Id. at 842 & fn. 8.

argument that "those factors which do not include the concept of 'control' are insignificant when compared to those that do;" (2) correctly noted that the *Restatement* "specifically permitt[ed] the consideration of . . . relevant factors" other than those identified by the *Restatement*; and (3) concluded that the "common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control."[8] *Roadway* has never been overruled, and the majority today cites the decision with approval—as it must, if it wants to claim (and maintain) continuity with the Board's well-established approach in this area.

B. The FedEx Cases

The Board's 2014 *FedEx* decision, overruled today, was a response to a 2009 divided-panel decision of the District of Columbia Circuit, which also involved drivers working for FedEx Home Delivery. Reversing a Board decision that had found the drivers to be employees,[9] the panel majority interpreted the Circuit's case law—and the Board's—as having shifted over time

> away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.'"

FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009), quoting *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002). "Thus," the panel majority announced, "while all of the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id.

This description of the Board's independent-contractor caselaw as evolving was inaccurate, as Circuit Judge Garland explained in his detailed dissent.[10] First, the Board had *not* treated "control" as an "animating principle" or master factor. The *Roadway* decision makes this plain. There, the Board rejected the argument that the *Restatement* factors that did not involve the right to control were relatively insignificant. Second, the Board decisions cited by the Circuit panel majority as marking the Board's supposed shift in emphasis—away from control and to "entrepreneurial opportunity"—reveal nothing of the sort.[11]

What *has* characterized the Board's independent-contractor doctrine since *Roadway* has been continuity, not change: a consistent emphasis on the *Restatement*'s multi-factor common-law test and a corresponding adherence to the Supreme Court's admonition in *United Insurance* that "[t]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[12]

The Board's 2014 *FedEx* decision[13] responded to the District of Columbia Circuit's misperception that the Board had *already* taken a new approach in evaluating employee status, and to the court's endorsement of that

[8] Id. at 850.

[9] A Regional Director, applying *Roadway*, determined that the drivers were employees. The Board denied the company's request for review of the Regional Director's decision. After an election that led to the union's certification, the Board ultimately found that the company had unlawfully refused to bargain. *FedEx Home Delivery*, 351 NLRB No. 16 (2007) (not reported in Board volumes).

[10] *FedEx Home Delivery*, supra, 563 F.3d at 504–519.

[11] Indeed, the Circuit panel majority itself "readily concede[d] that the Board's language ha[d] not been as unambiguous as" the court's own decisional language assertedly had. *FedEx Home Delivery*, supra, 563 F.3d at 498. But this concession was an understatement. In *Corporate Express*, 332 NLRB 1522 (2000), for example, the Board found that driver "owner-operators" working for a delivery company were statutory employees, not independent contractors, but gave no special emphasis to the concept of "entrepreneurial opportunity." In *Arizona Republic*, 349 NLRB 1040 (2007), meanwhile, a divided Board also reaffirmed *Roadway* and considered several factors (including "entrepreneurial potential" in connection with "method of compensation") in determining that the newspaper carriers at issue were independent contractors. But here, too, there was no hint of a shift in emphasis or the elevation of "entrepreneurial opportunity" into an "animating principle."

The same is true of two other Board decisions briefly cited by the Circuit panel majority. In *St. Joseph News-Press*, 345 NLRB 474 (2005), a divided decision involving newspaper carriers, a divided Board reaffirmed *Roadway*, observing that "both the right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors." Id. at 478. The Board majority concluded that "[o]n balance . . . under the common law test . . . the factors weigh in favor of finding independent contractor status." Id. at 479. Among the five factors relied upon, but given no special weight, was the "method of compensation, which allowed for a degree of entrepreneurial control." Id. In *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), the companion case to *Roadway*, the Board observed that the "list of factors differentiating 'employee' from 'independent contractor,' is nonexhaustive, with no one factor being decisive." Id. at 891. The Board observed that the "separateness" from the company of the owner-operator drivers was "manifested in many ways, *including* significant entrepreneurial opportunity for gain or loss," id. at 891 (emphasis added), but the decision relied on multiple factors, id. at 891–893, none of which was treated as of overriding importance.

[12] 390 U.S. at 258.

[13] *FedEx 2014* involved drivers at the company's Hartford, Connecticut facility. The Board initially denied review of a Regional Director's finding that the drivers were statutory employees. The District of Columbia Circuit then issued its own *FedEx* decision, which (as discussed) found that drivers at the company's Wilmington, Massachusetts facility were independent contractors. In turn, FedEx argued to the Board that, in light of the court's decision, it was required to revisit the earlier denial of review, prompting the Board to take up the issue. *FedEx*, supra, 361 NLRB at 610.

supposed shift. The *FedEx* Board first reaffirmed the Board's longstanding commitment to the principles articulated by the Supreme Court in *United Insurance*, to the "seminal" *Roadway* decision, and to the "nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency."[14] Second, the Board "more clearly define[d] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss, a factor that the Board has traditionally considered."[15] It "decline[d] to adopt the District of Columbia Circuit's . . . holding insofar as it treat[ed] entrepreneurial opportunity . . . as an 'animating principle' of the inquiry."[16]

"Entrepreneurial opportunity," the Board held, "represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business."[17] The Board carefully explained *why* it chose not to adopt the District of Columbia Circuit's approach, observing that this approach was not mandated by the Act, by the Supreme Court's decision in *United Insurance*, or by Board precedent and that "adopting it would mean a broader exclusion from statutory coverage than Congress appears to have intended."[18] The Board observed, in turn, that the "Restatement makes no mention at all of entrepreneurial opportunity or any similar concept," a "silence [that] does not rule out consideration of such a principle, but . . . cannot fairly be described as requiring it."[19] Meanwhile, the *United Insurance* admonition against relying on a "shorthand formula or magic phrase" weighed against the District of Columbia Circuit's approach.[20]

The Board has since applied the *FedEx* decision faithfully, continuing to examine each of the traditional common-law factors enumerated in the *Restatement*, as well as the independent-business factor, in making independent-contractor determinations.[21] The District of Columbia Circuit, meanwhile, denied enforcement to the Board's *FedEx* decision, applying the law-of-the-circuit doctrine and holding that the issue addressed there—the independent-contractor status of the company's drivers—had already been resolved by the Circuit's earlier decision.[22] Notably, other courts have reached a contrary conclusion, finding FedEx drivers to be employees under the common law. See, e.g., *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (applying California common law).[23]

As I will explain, while I did not participate in *FedEx* (which issued before I joined the Board), I am persuaded

[14] 361 NLRB at 610–611.

[15] Id. at 610.

[16] Id.

[17] Id. (emphasis omitted). The Board explained that it "should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." Id. at 610. Accordingly, the Board overruled two prior decisions by divided Board panels—*St. Joseph News-Press*, supra (decided in 2005), and *Arizona Republic* (decided in 2007)—"[t]o the extent that . . . [they] may have suggested that" the constraints effectively imposed on a putative contractor's ability to render services as part of an independent business "are *not* relevant to the Board's independent-contractor inquiry." Id. at 621 (emphasis added).

[18] Id. at 617.

[19] Id. at 618.

[20] Id.

[21] See *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124 (2017); *Pennsylvania Interscholastic Athletic Assn.*, 365 NRB No. 107 (2017); *Sisters' Camelot*, 363 NLRB No. 13 (2015); *Porter Drywall, Inc.*, 362 NLRB 7 (2015).

[22] *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017). However, it is noteworthy that in a post-*FedEx* decision, considering "entrepreneurial opportunity" as a "factor," the District of Columbia Circuit has also enforced the Board's decision (issued before *FedEx*) in which the Board determined that symphony orchestra musicians were statutory employees, not independent contractors, based on an analysis that seemingly departs from the court's own preferred approach. *See Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016), enfg. 357 NLRB 1761 (2011). The court described "entrepreneurial opportunity" as a "factor which does not appear in the Restatement but which the Board and this court use in assessing whether workers are employees or independent contractors." Id. at 569. The court analyzed the *Restatement* factors, then seemed to consider "entrepreneurial opportunity" as a separate factor, concluding that in the case of the musicians, it was "limited" and "provide[d] only miniscule support for independent contractor status." Id. at 570. "Summing up," the court determined "that the relevant factors point in different directions" and accordingly "defer[red] to the Board's conclusion that the . . . musicians [were] employees." Id.

[23] See also Mark J. Lowenstein, *Agency Law and the New Economy*, 72 Bus. Law. 1009, 1017–1020 (2017) (describing litigation involving FedEx drivers and collecting decisions).

Professor Lowenstein writes that "businesses often have crafted contracts to fit their workers within the definition of independent contractor" and that "[n]o business has been more creative in that regard than FedEx . . . whose efforts to craft an independent contractor relationship with its drivers spawned litigation across the country." Id. at 1017. As the U.S. Commission on the Future of Worker-Management Relations (the blue-ribbon Dunlop Commission) observed nearly 25 years ago:

> [C]urrent tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations. For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment laws. . . . Many low-wage workers have no practical choice in the matter.

U.S. Commission on the Future of Worker-Management Relations, *Final Report* 62 (1994) (available at www.digitalcommons.ilr.cornell.edu)

that the Board's decision was sound and defensible, and I see no good reason to abandon it—in particular, not for the confused approach adopted by the majority today, which cannot be reconciled with common-law principles or Supreme Court authority.

II. THE BOARD MAJORITY'S NEW TEST

Today, the majority overrules the *FedEx* decision, essentially embracing the District of Columbia Circuit's approach to "entrepreneurial opportunity." But the majority cannot have it both ways; it cannot claim fidelity to both the common-law test and the Circuit's approach, because that approach actually broke with the traditional test. In support of this shift, the majority claims that the *FedEx* Board gave too little weight to "entrepreneurial opportunity," and the Circuit, just the right amount—purportedly the *same* amount as the Board had traditionally given it. However, as explained above, this view is refuted by any fair reading of the decisions: the Board's, the Circuit's, and the Supreme Court's decision in *United Insurance*, which matters most of all.

The majority also claims that the approach taken by the *FedEx* Board is somehow contrary to the common-law agency test, and that its own approach conforms to that test. That claim is similarly baseless. Indeed, there is no real evidence to suggest that the traditional common law of agency, as reflected in the *Restatement* and as developed to address issues of tort liability, was informed by the concept of "entrepreneurial opportunity" at all. The majority seems to have been bewitched by just the sort of "magic phrase" the Supreme Court warned about and has accordingly elected to replace a sound test with an unsupportable formulation that is inconsistent with Board precedent as well as both the common-law and Supreme Court precedent.

A. Board precedent

There is no principled way to reconcile the District of Columbia Circuit's approach, now adopted by the majority, with Board precedent. With respect to the independent-contractor analysis, the court treated "entrepreneurial opportunity" as a "more accurate proxy" than the "unwieldy control inquiry."[24] But the *Roadway* Board in 1998's seminal decision had definitively rejected the claim that "control" was the key analytical concept—and, in the process, made clear that there *is* no such key, no "animating principle" (to use the court's phrase) of independent-contractor doctrine. In supposedly replacing "control" with "entrepreneurial opportunity," then, the court began with an incorrect premise (that one principle guides the analysis) and ended with a conclusion that fundamentally departed from Board doctrine.

Similarly, the court in *Fed Ex* erred when it explicitly rejected the Board's view "[b]ecause the indicia favoring a finding that the contractors are employees are clearly outweighed by the evidence of entrepreneurial opportunity." No Board decision has ever treated "evidence of entrepreneurial opportunity" as such a trump card. To the contrary, the two Board decisions in which such evidence was cited in support of finding independent-contractor status treated the evidence as simply one aspect of a common-law factor ("method of compensation") that was itself part of a multifactor test, with no factor receiving special weight.[25] It is simply incorrect to claim, as the majority does, that the District of Columbia Circuit's decision did not "depart[] in any significant way from the Board's traditional independent-contractor analysis."

Here, the majority fails in its attempt to explain how the District of Columbia Circuit's approach comports with *Roadway* or other Board precedent. It tellingly fails to cite a single Board decision that employs "entrepreneurial opportunity" as the Circuit does: to "evaluate" the common-law factors, and to ask—as the decisive question—"whether the position presents the opportunities and risks inherent in entrepreneurialism."[26] The majority echoes the Circuit in asserting that "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." But this is simply not how the Board has ever before approached independent-contractor determinations applying the common-law agency test.

Remarkably, the majority cites with apparent approval two Board decisions in which the *absence* of "entrepreneurial opportunity"—a function of constraints imposed by the employer—was relied upon as one factor among others in finding that drivers were employees, not independent contractors. Thus, in *Roadway*, supra, the Board explained:

> As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's busi-

[24] *FedEx*, supra, 563 F.2d at 497.

[25] See *Arizona Republic*, supra, 349 NLRB at 1042–1046; *St. Joseph News-Press*, supra, 345 NLRB at 478–479.

[26] Id.

> ness under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; *and they have no significant entrepreneurial opportunity for gain or loss. All these factors* weigh heavily in favor of employee status.

326 NLRB at 851 (emphasis added). Of course, even to find that the *lack* of "entrepreneurial opportunity" is enough to establish *employee* status would not mean that the presence of some "entrepreneurial opportunity," no matter how limited, would be enough to establish independent-contractor status. Nothing in *Roadway* suggests that if the drivers there had enjoyed "significant entrepreneurial opportunity for gain or loss," this alone would have been decisive.[27] The *Roadway* Board clearly did not use "entrepreneurial opportunity" to "evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain" (as the majority would have it).[28]

Nor did the Board do so in the companion case to *Roadway*, *Dial-A-Mattress*, supra, where it found delivery drivers to be independent contractors. The Board, citing *Roadway*, observed that the "list of factors differentiating 'employee' from 'independent contractor' status under the common-law agency test is nonexhaustive, with no one factor being decisive" and found that in the case before it, the "factors weigh[ed] more strongly in favor of independent-contractor status."[29] To be sure, the Board found that the drivers' "separateness from [the company] was manifested in many ways, including significant entrepreneurial opportunity for gain or loss," but the Board also distinguished *Roadway* in several respects, including by observing that the employer there "exercise[d] more control over its drivers' manner and means of accomplishing their work."[30] There was no "shorthand formula" at work in *Dial-A-Mattress* any more than in *Roadway*, but instead a nuanced analysis and weighing of multiple factors.

The Board's *FedEx* decision is entirely consistent with *Roadway* and *Dial-A-Mattress*, whereas the formulation adopted by the majority today manifestly is not.[31] Tellingly, the Circuit's *FedEx* decision did not cite either decision as evidence of the Board's supposed focus on "entrepreneurial opportunity," and the majority today is forced to say that the imaginary "shift[]" in the Board's "perspective" occurred "particularly *since Roadway*" (emphasis added)—when, in fact, it never happened at all (until today). As the District of Columbia Circuit has itself explained, "[a]n agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'"[32] Under the cover of the Circuit's decision, this is just what the majority has done here: departed from Board precedent—that is, the precedent *before FedEx*—without ever acknowledging that it conflicts with today's decision.

The most the majority will say is that "the Board's precedent in this area . . . has not been entirely consistent" and that "[t]oday's decision is intended to eliminate any ambiguity over how to treat entrepreneurial opportunity in the Board's independent-contractor analysis in the future." In fact, however, it was the Board's *FedEx* decision that, responding to the District of Columbia Circuit, actually eliminated ambiguity and clarified Board doctrine, within permissible bounds. The majority's decision, in contrast, adopts an impermissible approach that cannot be reconciled with what came before and that provides no clear guidance for the future.

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[27] To recall, the *Roadway* Board explicitly rejected the view that the non-control factors were relatively insignificant to the common-law analysis. 326 NLRB at 850. The majority mistakenly posits that "employer control and entrepreneurial opportunity are opposite sides of the same coin," ignoring the fact that "entrepreneurial opportunity" has no apparent basis in the common law of agency. But even by the majority's token, *Roadway* cannot possibly be read to hold that "entrepreneurial opportunity" (any more than "control") diminishes the weight to be given to factors that do not implicate either control or its supposed obverse.

[28] The majority also cites *Corporate Express*, supra, but to no avail. There, in the course of addressing the usual range of traditional factors, the Board observed:

> They [the drivers] have no proprietary interest in their routes *and no significant opportunity for entrepreneurial gain or loss*. The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by the [employer], and owner-operators have no right to add or reject customers.

332 NLRB at 1522 (emphasis added). But the Board did not treat "entrepreneurial opportunity" as the analytical key to the case.

Nor did the Board do so in *Slay Transportation Co.*, 331 NLRB 1292 (2000), also cited by the majority. There, the Board examined all of the traditional common-law factors in holding the drivers to be employees, observing (among other things) that the drivers were "given specific instructions as to the manner in which they [were] to perform their tasks," that they did not "operate independent businesses," and that they performed functions that were "the very core of [the employer's] business." Id. at 1293–1294. "Having considered *all* of the incidents of the [drivers'] relationship with the [e]mployer," the Board concluded "that the various factors of the common law agency test weigh[ed] heavily in favor of employee status." Id. at 1294.

[29] 326 NLRB at 891.

[30] Id. at 893.

[31] It merits notice that, by citing *Roadway* and *Corporate Express* with approval, the majority seems to recognize (as it must) that to the extent that the "entrepreneurial opportunity" of a purported independent contractor is, as a practical matter, constrained by the company he works for, it is entitled to correspondingly lesser weight in the analysis. If a purely theoretical "entrepreneurial opportunity" were enough to make a worker an independent contractor, then the *Roadway* Board would not have found the drivers there to be employees.

[32] *NLRB v. CNN America, Inc.*, 865 F.2d 740, 751 (D.C. Cir. 2017).

B. Supreme Court Precedent and the Common Law

Even more troubling than this inconsistency with Board precedent is the majority's failure to reconcile its new approach with common law principles and the Supreme Court's decision in *United Insurance*. Certainly, today's majority repeats the District of Columbia Circuit's profession that its approach was faithful to *United Insurance* and pays lip service to the settled principle that the "ten-factor [*Restatement*] test is not amenable to any sort of bright-line rule."[33] But the approach adopted by the Circuit, and now by the Board majority today, is precisely the kind of "shorthand formula" that both the common law and the *United Insurance* decision reject.[34]

The majority argues that it is *required* to overrule the Board's *FedEx* decision because the decision "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis." According to the majority, the *FedEx* Board effectively abandoned the common-law agency test in favor of the "economic realities" test endorsed by the Supreme Court's 1944 *Hearst* decision, but then legislatively overruled by Congress in 1947. This claim is baseless. Indeed, it is the majority's approach today—with its endorsement of "entrepreneurial opportunity" as a sort of super-factor—that subordinates the common law to a particular vision of supposed "economic reality" where workers are deemed "entrepreneurs" and labor law, irrelevant. Neither the common law nor the policies of the Act support the majority's expansive view of how "entrepreneurial opportunity" should operate to exclude workers from statutory coverage.[35]

The majority's position rests on the premise that "entrepreneurial opportunity" is the core concept of the traditional common-law agency test. There is no support for such a claim. If the common-law agency test has a core concept, it is demonstrably not "entrepreneurial opportunity," but rather "control" (although, to be sure, the *Roadway* Board rejected the view that the *Restatement* factors "which do not include the concept of 'control' are insignificant when compared to those that do"[36]). As the District of Columbia Circuit itself has just told us, "the 'right to control' [not 'entrepreneurial opportunity'] runs like a *leitmotif* through the Restatement (Second) of Agency."[37] Thus, as noted, *Restatement* Section 220(1) defines a "servant" (as opposed to an independent contractor) as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is *subject to the other's control or right of control*." *Restatement* Section 220, comment g, in turn, traces this definition to the idea that because "the master can exercise control over the physical activities of the servant," he is properly held liable for harm caused by the servant.

The *Restatement* certainly does not define a "servant" as a "person employed to perform services in the affairs of another and who in the performance of the services *lacks entrepreneurial opportunity for gain or loss.*"[38] But this is how the majority, embracing the District of Columbia Circuit's approach, has effectively rewritten the definition. None of the *Restatement* Section 220(2) factors, meanwhile, explicitly or implicitly incorporate the concept of "entrepreneurial opportunity." "Entrepreneurial opportunity" does not inform (in any clear and direct way, at least): "extent of control;" "distinct occupation or business;" "kind of occupation;" "skill required;" who supplies the instrumentalities; "length of time . . . employed;" "method of payment;" "part of the regular business;" the parties' belief in what relationship they are creating; and the "business" of the principal.[39] Citing the *Restatement*, the Supreme Court has observed that "[a]t common law the relevant factors defining the master-servant relationship focus on the master's control over the servant," and that in determining whether a person is an "employee" under a federal statute that does not otherwise define the term, "the *common-law element of*

[33] 563 F.3d at 496.

[34] It is clear from the District of Columbia Circuit's decision that it was, indeed, applying a new standard and thus rejecting the Board's view (that the FedEx drivers were employees) "[b]ecause the indicia favoring a finding that the contractors are employees are clearly outweighed by the evidence of entrepreneurial opportunity." 563 F.3d at 504. This approach amounts to a "shorthand formula," despite any disclaimer. It was the adoption of this formula, in turn, that enabled the Circuit to reject the Board's view of the case, despite the deferential standard of judicial review established by *United Insurance*.

[35] The explicit policy of the National Labor Relations Act is "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ." NLRA, Sec. 1, 29 U.S.C. §151. In light of that policy, exclusions from statutory coverage should be interpreted narrowly.

[36] 326 NLRB at 850.

[37] *Browning-Ferris Industries of California, Inc. v. NLRB*, No. 16-1028, slip op. at 27 (D.C. Cir. Dec. 28, 2018). "[A]t bottom," the court observed, the "independent-contractor test considers *who, if anyone, controls the worker* other than the worker herself." Id. at 33 (emphasis added).

[38] The dictionary definition of an "independent contractor" (the term actually used in Sec. 2(3) of the National Labor Relations Act) is "one that contracts to do work or perform a service for another and that *retains total and free control* over the means and methods used in doing the work or performing the service." *Webster's Third New International Dictionary of the English Language* 1148 (1966) (emphasis added).

[39] See fn. 5, supra (quoting *Restatement* §220(2) factors).

control is the principal guidepost that should be followed."[40]

To be clear, the Supreme Court has not held that "*entrepreneurial opportunity*" is "the principal guidepost that should be followed." Nor does the majority's incorrect description of "employer control" and "entrepreneurial opportunity" as "opposite sides of the same coin" do the analytical trick. As explained, the focus of the common law of agency is determining tort liability—a master is liable for the torts of his servant—and liability follows from control.[41] The servant's "entrepreneurial opportunity" (or lack of it) is simply not part of the common-law equation. While one can debate whether the common law of agency is well suited to determining covered-employee status under a federal statute like the National Labor Relations Act, that was the choice that Congress made, as the Supreme Court has definitively held. Here, as in the joint-employer context, the Board "must color within the common-law lines identified by the judiciary."[42]

Quoting then-Member Johnson's dissent, the majority criticizes the *FedEx* Board's approach because (in the majority's view) it "greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency." What the majority fails to explain, however, is where, how, and why traditional common-law agency doctrine not only incorporates the concept of "entrepreneurial opportunity," but also subordinates the "control" factors to it (along with the remaining *Restatement* factors, as well). With approval, the majority cites the supposed "evolving emphasis on entrepreneurial opportunity" in the decisions of the District of Columbia Circuit and the Board, as described by the *FedEx* court. But the majority does not explain how the common-law agency test applied by the Board (or the Circuit) could evolve in a fundamental way and yet still adhere to the *Restatement*, the legal source treated as authoritative by the Supreme Court.[43] Put somewhat differently, the traditional common law of agency does not develop through the decisions of the Board and the District of Columbia Circuit, but rather exists independently of them.[44] *United Insurance*, meanwhile, contains no hint that "entrepreneurial opportunity" was an "animating principle" of the common-law test. The approach taken by the *FedEx* Board, unlike the majority's today, is entirely consistent with common-law agency principles.

The *FedEx* Board did no more than permissibly refine the way that the Board would apply the common-law agency test.[45] Essential to the majority's criticism of *FedEx* is the suggestion that it was somehow illegitimate to treat "entrepreneurial opportunity" as a factor, or as an element of a factor, in the independent-contractor analysis. Thus, the majority insists that "[p]roperly understood, entrepreneurial opportunity is not an independent common-law factor;" rather, it is "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain" and thus (according to the majority), the *FedEx* Board "impermissibly altered the Board's traditional common law test . . . by severely limiting the significance of entrepreneurial opportunity to the analysis." As

[40] *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448 (2003) (emphasis added) (addressing employee status under Americans with Disabilities Act of 1990). The majority—citing the *Restatement*'s example of a full-time cook regarded as a servant, despite the fact that the employer exercises "no control over the cooking"—observes that a "master-servant relationship can exist in the absence of the master's control over the servant's performance of work." This single example, however, in no way suggests that "entrepreneurial opportunity" informs the common-law analysis. Indeed, it refutes the majority's assertion that "entrepreneurial opportunity" is simply the obverse of "control." That the cook's employer does not control his cooking does not mean that the cook has "entrepreneurial opportunity."

[41] See *Restatement (Second) of Agency* §219.

[42] *Browning-Ferris Industries*, supra, No. 16–1028, slip op. at 21.

[43] See, e.g., *Nationwide Mutual Insurance*, supra, 503 U.S. at 323–324.

[44] Thus, in recently upholding the Board's joint-employer standard, the District of Columbia Circuit "look[ed] first and foremost to the 'established' common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947." *Browning-Ferris Industries*, supra, No. 16–1028. slip op. at 22. There is no clear indication that in adopting the "independent contractor" exclusion in 1947—and thus incorporating the common-law agency test into the National Labor Relations Act (as the Supreme Court held in *United Insurance*)—Congress intended for the test to evolve over time, much less that this evolution was to be directed by the Board or by the federal courts.

[45] As explained, the *FedEx* Board sought to refine how evidence of "actual entrepreneurial opportunity for gain or loss" is "to be properly assessed as part of the traditional common-law factors." 361 NLRB at 620. It observed that the Board "has been less than clear about this point." Id. In some cases, "entrepreneurial opportunity ha[d] been analyzed expressly as a separate factor." Id., citing *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011), and *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004). In others, it was "integrated into the Board's analysis of other factors." Id., citing *Roadway*, supra, 326 NLRB at 851–853, and *Stamford Taxi*, 332 NLRB 1372, 1373 (2000). The Board had also "spoken in terms of the 'economic independence' of putative contactors from their employing entities." Id., citing *Slay Transportation*, supra, 331 NLRB at 1294. Synthesizing the Board's prior decisions, the *FedEx* Board articulated a new "independent-business" factor, which "supplements—without supplanting or overriding—the traditional common-law factors," and explained that the "weight given to the independent-business factor will depend upon the factual circumstances of the particular case." Id. at 621.

explained already, it is the majority's treatment of "entrepreneurial opportunity" as a sort of super-factor that contradicts the common-law agency test. As for the *FedEx* Board's approach, in contrast, the *Restatement* explicitly states that the factors listed in Section 220(1) are considered "among others." The *Roadway* Board, in turn, accurately described the *Restatement* as "specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented."[46] Pre-*FedEx* decisions by the Board, as noted, have treated "entrepreneurial opportunity" as a factor. And, as earlier pointed out, the District of Columbia Circuit itself, in a post-*FedEx* decision, has described "entrepreneurial opportunity" as a "factor" to be considered, along with those identified in the *Restatement*.[47]

The majority's insistence that the *FedEx* Board impermissibly abandoned common-law agency principles to return to the "economic realities" test articulated by the Supreme Court in *Hearst*, supra, is baseless—as demonstrated by any fair reading not only of *FedEx*, but of the Board decisions that have since applied *FedEx*, all of which reflect a careful analysis of the *Restatement* factors and the independent-business factor articulated in *FedEx*. In *Porter Drywall*, for example, the Board followed this approach and determined that "crew leaders" hired as drywall-installation subcontractors were independent contractors, not employees.[48] Then-Member Johnson (who had dissented in *FedEx*) concurred, observing that the result would have been the same under the test he had advocated there.[49] If *FedEx* had actually left the common law behind, one might think it would yield different results.

On that score, finally, it is worth pointing again to the Ninth Circuit's *Alexander* decision involving FedEx drivers. There, the court—just like the *FedEx* Board—held that the drivers were not independent contractors, but rather employees. Applying California common law, which closely resembles the approach of the *Restatement*, the Ninth Circuit rejected the company's reliance on the District of Columbia Circuit's *FedEx* decision, observing that there was "no indication that California had replaced its longstanding right-to-control test with the *new entrepreneurial opportunities test developed by the D.C. Circuit*" and explaining that under California law, the sort of company-constrained "entrepreneurial opportunities" available to the drivers "did not override other factors in [the] multi-factor analysis."[50] The Ninth Circuit's decision, then, illustrates that the test adopted by the Board majority today is the novelty, a departure from traditional common law.

III.

The "entrepreneurial opportunities" test, in short, cannot be reconciled with the Board's pre-*FedEx* precedent (to which the majority claims to adhere) or with Supreme Court precedent and the common law of agency (to which the Board *must* adhere). But that is not where the problems with today's decision end, because while the majority adopts the "entrepreneurial opportunities" test, it does not apply the test as articulated.

Under the test adopted and articulated by the majority, "entrepreneurial opportunity . . . is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Precisely what this means, even in theory, is not easy to understand. In its subsequent analysis of the record evidence here, however, the majority does not evaluate "the overall effect of the common -law factors." Instead, it begins its analysis by reciting ways in which the SuperShuttle drivers assertedly resemble "entrepreneurs or small business owners," and then asserts that "these factors"—which are not, in fact, drawn from the *Restatement*—"are not outweighed by any countervailing

[46] 326 NLRB at 850. The District of Columbia Circuit is in agreement on this point. See, e.g., *FedEx Home Delivery*, supra 849 F.3d at 1125 (describing *Restatement* as "provid[ing] a non-exhaustive list of ten factors to consider").

[47] *Lancaster Symphony Orchestra*, supra, 822 F.3d at 569–570.

[48] *Porter Drywall*, supra, 362 NLRB 7.

[49] Id. at 12.

[50] 765 F.3d at 993–994 (emphasis added). The majority discounts the Ninth Circuit's decision based on its mistaken view that the court applied a California test fundamentally different than the common-law agency test that the Board is required to apply. The Ninth Circuit described California law this way:

> California's right-to-control test requires courts to weigh a number of factors: "The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."
>
> . . .
>
> California courts also consider "several 'secondary' indicia of the nature of a service relationship. . . ." The right to terminate at will, without cause, is "[s]trong evidence in support of an employment relationship." Additional factors include:
>
> " (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee."

765 F.3d at 988 (citations omitted). The close similarity to the *Restatement* test is obvious.

factors supporting employee status." Only then does the majority turn to the *Restatement* factors. In short, the majority does, indeed, treat "entrepreneurial opportunity" as an "overriding consideration." The internal inconsistencies in the majority's approach are reason enough to reject its analysis.[51]

By contrast, even putting aside the now-overruled *FedEx* approach, looking only to pre-*FedEx* Board precedent (which remains good law), and keeping SuperShuttle's burden of proof in mind, a careful examination of the *Restatement* factors, as the Board has traditionally applied them, should lead to a finding of employee status here. Notably, the SuperShuttle drivers bear a strong resemblance to the insurance agents found by the Supreme Court to be employees, not independent contractors, in *United Insurance*, supra. Thus, the Regional Director erred in dismissing the Union's representation petition: the SuperShuttle drivers should be permitted to pursue the union representation that they seek.

A. Essential Facts

The essential facts here are straightforward and not in dispute—although the majority's discussion neglects certain facts that cut against its ultimate conclusion that the drivers are independent contractors.

SuperShuttle has a contract with the Dallas/Fort Worth International Airport Board, a public agency, to provide a shared-ride service to airport customers. The relationship between SuperShuttle and its drivers, in turn, is governed in comprehensive detail by the "Unit Franchise Agreement" (UFA).

The UFA is effectively imposed on the drivers by SuperShuttle. It is a standard agreement, not subject to negotiation by individual drivers, and (by its terms) it may be changed by SuperShuttle at will. The UFA prohibits drivers from engaging in any business activity that will conflict with their obligations under the agreement—including working for a SuperShuttle competitor and any involvement with another business that provides transportation services (a fact the majority ignores).

Under the UFA, drivers pay SuperShuttle not only an initial "franchise fee," but also a flat, weekly system fee ($575 for a Dallas/Fort Worth Airport franchise) and a $100-per-week contribution to reimburse SuperShuttle for its payment of certain driving-related fees.

The UFA requires drivers to buy or lease a van that meets SuperShuttle's detailed specifications. Most drivers lease their vehicles—and SuperShuttle has its own, affiliated leasing company, which (as SuperShuttle's general manager testified) "helps these guys who have poor credit"—a fact the majority ignores.

SuperShuttle provides training to its drivers, not only the training required by its contract with the airport board, but also training in its "brand standards" and the operation of its communication systems—subjects that the UFA describes as "unique to the SuperShuttle system." (The majority does not mention this.)

Central to the drivers' work is SuperShuttle's Nextel trip generating system, which the UFA requires drivers to use. The specialized equipment drivers must use includes a pager, a two-way radio, and a global-positioning navigation system—all owned by SuperShuttle, which prohibits the drivers from using the equipment outside the SuperShuttle system.

SuperShuttle does not set drivers work schedules, routes, or assignments. But SuperShuttle's Nextel trip generating system is integral to dispatch services. The system generates job "bids," that drivers ostensibly may accept or decline. However, drivers testified that they had been fined for declining bids. One driver testified that deciding whether to accept or decline a bid was "commonsense stuff," based on the time and distance involved in picking up a passenger. Drivers testified that whether or not SuperShuttle required them to work, they felt a practical need to work to be able, at least, to make the fixed, weekly system payments to the company that SuperShuttle required. SuperShuttle, not the drivers, sets the fares. And, as mentioned, if drivers wish to work as drivers, they must do so only for SuperShuttle.

Under the UFA, a driver may use a substitute or relief driver, but only if the other driver meets SuperShuttle's detailed requirements. The UFA also imposes detailed requirements on the transfer, assignment, or sale of a SuperShuttle franchise.

B. The Restatement Factors

1. Factors the majority concedes support employee status

Starting with the factors that the majority concedes favor a finding of employee status, it is clear here that the drivers are not "engaged in a distinct occupation or business."[52] In fact, their "work is a part of the regular business of the employer," SuperShuttle.[53] The "principal,"

[51] See *Allentown Mack*, supra, 522 U.S. at 374–375.

[52] *Restatement (Second) of Agency* §220(2)(b).

[53] Id., §220(2)(h). Beyond the common color scheme and driver uniforms (which are required by the Airport Contract), every aspect of driver performance manifests SuperShuttle's "uniform method and philosophy of operation, customer service, marketing, advertising, promotion, publicity, and technical knowledge relating to the airport shuttle service business." At the outset, drivers receive training in brand standards and the Company's proprietary system designed to foster a consistent customer experience across SuperShuttle vehicles and affiliates.

In their work, drivers are fully integrated into SuperShuttle's nationwide organization and "central reservation system": trip requests

SuperShuttle, "is . . . in business."[54] The majority correctly explains that "SuperShuttle is clearly involved in the business of transporting customers, and its revenue comes from providing that service." As for the "skill required in the particular occupation,"[55] the majority acknowledges that "the record does not indicate that drivers have any particular skill."[56] Putting these factors together, of course, reveals unskilled workers who perform the core function of a particular commercial enterprise.[57] That picture is very strongly suggestive of an employment relationship, as traditionally understood.[58]

The suggestion is reinforced, moreover, by a fact the majority tellingly minimizes, relegating to a footnote the fact that SuperShuttle, through the nonnegotiable franchise agreement, prohibits the drivers from working for other transportation companies. The Board has previously relied on such restrictions as demonstrating employer control.[59] Even with respect to their own work for SuperShuttle, meanwhile, the drivers may not arrange for a substitute or surrogate, unless SuperShuttle approves. At the time of the hearing, only 1 of 88 drivers employed a relief driver. The *Restatement* observes that "an agreement that the work cannot be delegated" is a factor "indicating the relation of master and servant."[60]

Thus, even under the majority's own view, SuperShuttle performs the very core of its business with a work force consisting entirely of unskilled workers, who are otherwise prohibited from working in the industry and who are subject to a uniform agreement imposed by the company on each of them. This situation, it is fair to say, is the antithesis of the independent-contractor relationship envisioned by the common law of agency. But there are, of course, additional common-law factors to consider.

2. Factors the majority characterizes as neutral

In addition to the factors that the majority concedes support finding employee status (engagement in a distinct business, work as part of the employer's regular business, the principal's business, and skill required), the majority treats length of employment as neutral, observing that drivers are required to sign the 1-year Unit Franchise Agreement, but "most drivers renew their agreements yearly." On this record, however, it should be apparent that the length-of-employment factor actually weighs in favor of employee status.

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are processed via the Company's website and central telephone number, and jobs are allocated to drivers by a network of dispatch managers. By General Manager Harcrow's account, drivers also receive support from SuperShuttle's franchise manager, training and safety manager, sales and marketing team, and accounting department.

Drivers also rely on the Nextel system, which is required to receive jobs and process customer fares. In addition, the availability of work for drivers largely depends on SuperShuttle's access to Airport facilities, name recognition, marketing and advertising efforts, relationships with hotels, and internet partnerships.

[54] Id., §220(2)(j). SuperShuttle DFW, by the terms of the UFA, operates "a demand responsive and/or scheduled airport shuttle . . . providing transportation to passengers traveling to and from specific metropolitan airports and destinations within the general markets surrounding those airports." Accordingly, drivers' work "is the precise business of the [employer]." *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474, 475 (2004).

[55] Id., §220(2)(d).

[56] Drivers are not required to have any special training or skills. Apart from the required licenses and shuttle certifications, drivers acquire the skills and information they need during the training and ride-along sessions that SuperShuttle provides.

[57] It is almost inconceivable that at common law, such an enterprise would *not* be held liable for a tort committed by one of its workers while working. And that, of course, is the proper reference point, because (as described) common-law agency principles were developed for the purpose of determining a principal's liability for the acts of his agent.

[58] See, e.g., *Prime Time Shuttle*, 314 NLRB 838, 840 (1994) ("The business of the [employer] is providing shared rides to the public and its vans and drivers perform that function. Driving is not merely an essential part of [the employer's] business it is [the employer's] business."); *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000) (drivers "devote virtually all of their time, labor and equipment to providing the essential functions of the [employer's] . . . business."); see also *Slay Transportation Co.*, supra, 331 NLRB at 1294 ("[Drivers] perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business").

[59] See, e.g., *Metro Cab Co.*, 341 NLRB 722, 724 (2004); *Stamford Taxi*, supra, 332 NLRB at 1373; see also *Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2004) (finding drivers to be independent contractors, relying in part on fact that company's agreement with drivers reserved drivers' right to provide services for other carriers). Restrictions on working for a competitor certainly do not suggest an independent-contractor relationship. It is hard to imagine, for example, a company engaging a skilled tradesman (like a plumber), with his own business, to make repairs—but only if he agrees not to do similar repair work for a competing company.

The majority "acknowledge[s] that the UFA's prohibition on franchisees entering into business relationships with SuperShuttle's competitors limits to some extent the potential for entrepreneurial opportunity that would otherwise come with ownership of their vans." It is obviously no answer to say, as the majority does, that this "limitation is mitigated" because the drivers are free to drive *for SuperShuttle* as much as they want. The point is that the drivers are locked into SuperShuttle's system and cannot drive—at any time—for another company (including one of their own creation) that might allow them greater economic gains.

[60] *Restatement (Second) of Agency* §220, comment h. The independent-contractor plumber may well choose to send someone else to do the repair, but the employee plumber must show up for work himself if he wants to keep his job. The facts here stand in contrast to those in *Argix Direct*, supra, where some independent-contractor drivers had their own independent contractors and hired their own drivers, independently setting their terms and conditions of employment. 343 NLRB at 1020–1021.

The majority acknowledges, as it must, that "a longer employment relationship indicates employee status."[61] Here, driver relationships with SuperShuttle have continued indefinitely, and General Manger Harcrow testified that he had never denied a renewal request. As the Board has observed, such an "open-ended duration" of the working relationship indicates employee status.[62]

3. Factors the majority characterizes as supporting independent contractor status

The majority characterizes the extent of control exercised by the employer as a factor strongly supporting independent contractor status. However, here the evidence of SuperShuttle's control over the drivers and the details of their work, as reflected in the Unit Franchise Agreement, is overwhelming. The majority ignores or minimizes that evidence at every turn.[63]

To begin, there is the obvious fact of the nonnegotiable Unit Franchise Agreement itself. Its identical terms are imposed by SuperShuttle on every driver, and there is no contractual limit at all on what SuperShuttle may require the drivers to do while performing work. Notably, the UFA requires drivers "not to deviate from the standards, specifications and operating procedures as specified in this Agreement . . . in order to ensure uniformity and quality of services offered to the public." The UFA explains that the SuperShuttle system has been "developed as a uniform method and philosophy of operation, customer service, marketing, advertising, promotion, publicity, and technical knowledge relating to the airport shuttle service business." Not even the requirements incorporated in the UFA are fixed. Rather, the UFA authorizes SuperShuttle to "from time to time . . . add to, subtract from or otherwise modify or change [the driver's] obligations under the [SuperShuttle] System, including, without limitation, changes reflecting SuperShuttle's adoption and use of new or modified Marks, services, equipment and new techniques relating to the promotion and marketing of shuttle services." If this is not control "by the agreement . . . over the details of the work" (in the *Restatement's* formulation), then it is hard to grasp what control could be—even excluding the fact that the UFA prohibits drivers from working for another transportation company, a demonstration of employer control under Board precedent (as already shown).

The majority virtually ignores what the Unit Franchise Agreement is and what it does. Instead, the majority insists that drivers "are free from control by SuperShuttle in most significant respects in the day-to-day performance of their work." The majority points out that drivers may decide when to work and which trips to accept. But this hardly demonstrates freedom from control, in light of the fact that if and when the drivers work—and they can only work for SuperShuttle—they must operate entirely within SuperShuttle's Nextel trip generating system, which generates job "bids" and which can lead to fines if a driver accepts a bid, but fails to complete the pickup.[64] There is no other way for drivers to perform their services for SuperShuttle. And, of course, drivers need to work, because they are required to make substantial weekly payments to SuperShuttle, whether or not they are working; SuperShuttle, as noted, uniformly fixes both the payments to be made and the fares the drivers receive.[65]

[61] Id , comment j ("If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him."). In this respect, as several others, driving for SuperShuttle is very much SuperShuttle's job—not the drivers'.

[62] *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984).

[63] The UFA, imposed by the SuperShuttle on the drivers, is distinct from the Airport Contract between SuperShuttle and the DFW Airport Board, which allows SuperShuttle to operate at the airport subject to certain conditions. The conditions required by the Airport Contract do not include the UFA or its provisions, of course.

The majority points out that the Airport Contract does effectively impose certain requirements on SuperShuttle drivers: they must wear a uniform, maintain grooming standards, display SuperShuttle decals and markings on their vans, and maintain the interior condition of their vans. Because these requirements are imposed by a governmental agency, they are immaterial (under current Board law) to the issue of SuperShuttle's control over the drivers. But, as I show here, SuperShuttle's control is easily demonstrated without relying at all on the Airport Board-imposed requirements. The majority identifies no example of SuperShuttle's control on which I rely that is, in fact, required by the Airport Contract. The UFA goes far beyond anything required by the Airport Contract, and the majority does not argue otherwise. Instead, it equivocates, pointing to the fact the UFA "states that many restrictions imposed by the Airport Contract are effectively passed along in the UFA." But the Airport Contact does not (for example) require SuperShuttle to impose the UFA on its drivers, to prohibit drivers from working for other transportation companies, to buy or lease a van that meets SuperShuttle's detailed specifications, to charge drivers a "franchise fee" and a weekly system fee, to provide training in SuperShuttle's "brand standards" and the operation of its communications systems, and to use SuperShuttle's specialized equipment and the Nextel trip generating system.

[64] The majority insists that the "Nextel device does not allow SuperShuttle to exercise control over the" drivers, but certainly it does. The drivers must use the device, and without the device, they have no way to find passengers. The *Restatement* considers "the extent of control which, by the agreement, the master may exercise over the details of the work." Finding passengers is surely a detail of the drivers' work—and SuperShuttle controls it.

[65] The majority necessarily acknowledges that "[f]ares received . . . are set by SuperShuttle," but still insists that even if drivers "could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle's fares" because "[a]s a practical matter, fares are set by the competitive airport transportation market." There is no evidence in the record here to support the majority's claim. Indeed, given the crucial role of the Dallas/Fort Worth International Airport Board—whose contract with SuperShuttle makes the company's operations

The only SuperShuttle-imposed requirements on the drivers that the majority is prepared to acknowledge involve (in addition to fare-setting) the required acceptance of fare vouchers and coupons, vehicle inspections, a "How am I driving?" sticker, and training. These "limited employer controls are vastly outweighed by the general control that [the drivers] have over their working conditions."[66] If these supposedly "limited employer controls" were really all that was involved in this case, then the "extent of control" factor might pose a closer question here. But what the majority omits from its analysis, the failure to see the bigger picture, is what actually matters most.

The majority relies on four other factors to find independent-contractor status, but none provide much help to SuperShuttle in carrying its burden of proof here. Indeed, contrary to the majority, some of these factors actually further support a finding of employee status.

Under Board precedent, the "method of payment" factor[67] points away from an employment relationship, because the drivers do not share the fares they collect from customers with SuperShuttle. As the majority explains, the rationale for this principle is that "[w]hen an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work." But here, as explained, SuperShuttle does indeed have the authority to control the manner and means of the driver's work—and exercises it. Its "motivation" is obvious: it wishes to retain its contract with the Airport Board. Thus, the "method of payment" factor—a secondary consideration, at least as the Board has explained it—should be given relatively little weight.[68]

The majority cites the terms of the Unit Franchise Agreement as evidence that the parties believed that they were creating an independent-contractor relationship.[69] Certainly the terms of the UFA are clear. But the agreement itself is imposed by SuperShuttle on the drivers, with no opportunity for negotiation, and at least 30 percent of the drivers demonstrated their (correct) view that they are employees, by signing union-authorization cards in connection with the Union's representation petition filed with the Board. In similar circumstances, the Board has held that the parties'-belief factor "point[ed] in no clear direction,"[70] and it does little here toward satisfying SuperShuttle's burden of proof.

Contrary to the majority, the "instrumentalities, tools, and place of work" factor at best (for the majority) points in no clear direction either, while there are very good reasons to treat it as weighing in favor of employee status. True, drivers own or lease their vans. But SuperShuttle plays an important role in this process through its affiliated leasing company (never mentioned by the majority)—which makes it possible for drivers with bad credit, in particular, to acquire a van (then outfitted to meet SuperShuttle's specifications).[71] The majority says that drivers' "full-time possession of their vans facilitates their ability to work whenever and wherever they choose," but under the UFA, the drivers are *never* free to use their vans to work for any business except SuperShuttle. Perhaps even more significant, the drivers undeniably could not perform their work without SuperShuttle's required communications equipment, which the company supplies and owns—and which drivers are also not free to use independently, unlike the traditional independent contractor and his work tools.

Finally, the majority cites the "supervision" factor as favoring independent-contractor status, invoking the drivers' supposed "near-absolute autonomy in performing their daily work without supervision." But drivers are subject to the SuperShuttle System at all times. Pursuant to the UFA, drivers must adhere to the "mandatory specifications, standards, operating procedures, and rules for the SuperShuttle system" set forth in the UFA and the Drivers' Operations Manual, as well as the specific oper-

possible in the first place—it is not at all clear that there *is* a "competitive airport transportation market." And SuperShuttle itself, in the UFA, has taken steps to eliminate competition in whatever market there is, by prohibiting drivers from working for competing companies. In short, the majority's claim here is at best an unsupported speculation.

[66] The majority also cites, as evidence of independent-contractor status, that the drivers are required to indemnify SuperShuttle, citing *Dial-A-Mattress*, supra, for the proposition that "[i]n employment relationships, employers generally assume the risk of third-party damages." 326 NLRB at 891. However, SuperShuttle's contract with the Airport Board requires that all drivers be covered under its insurance policy, and SuperShuttle, in turn, requires the drivers to reimburse SuperShuttle for the insurance it provides to them. In short, the insurance-related dealings between SuperShuttle and the drivers are mediated by the Airport Board, making the situation in *Dial-A-Mattress* easily distinguishable. The majority insists that the role of the Airport Board here is immaterial, but just as controls on the drivers effectively imposed by the Airport Board (not SuperShuttle) are not probative of an employment relationship, so the role of the Airport Board in connection with liability insurance must be taken into account.

[67] See *Restatement (Second) of Agency* §220(2)(g) (distinguishing between "by time" or "by the job").

[68] See *Metro Cab*, supra, 341 NLRB at 724–725 (inference of minimal control overcome by "evidence of the [e]mployer's extensive control" over drivers' work).

[69] See *Restatement (Second) of Agency* §220(2)(i).

[70] *Lancaster Symphony*, 357 NLRB at 1766.

[71] One might compare this case to *Argix Direct*, supra, where the Board observed that the putative employer did not own or lease any of the independent-contractor drivers' trucks or provide them with financial help to acquire trucks. 343 NLRB at 1020.

ating procedures imposed by the trip generating system. It is certainly true that no SuperShuttle supervisor sits in the front passenger seat, telling drivers what to do, but under the UFA, SuperShuttle clearly would have the right to adopt such a practice, and drivers would have to no choice but to accept it. SuperShuttle enjoys broad authority, meanwhile, to discipline and terminate drivers, both for driving-related infractions and for other violations of the UFA. In any case, the *Restatement* notes that the "control or right to control needed to establish the relation of master and servant may be very attenuated."[72] The "supervision" factor, as described in the *Restatement*, addresses "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or *by a specialist without supervision*."[73] Here, the unskilled drivers cannot fairly be called "specialists." Indeed, as the *Restatement* notes, "[u]nskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contact to do a specified job for a specified price."[74]

4. Overall assessment of the Restatement factors

Having addressed the *Restatement* factors, the majority sums them up to conclude that the SuperShuttle drivers are independent contractors—without ever mentioning the established rule that it is SuperShuttle that bears the burden of proof.[75] The factors that the majority concedes support *employee* status—the drivers are unskilled, driving is not a distinct occupation, and "SuperShuttle's involvement in the business"—are deemed "relatively less significant" and as "not outweigh[ing] those factors that support independent-contractor status." But the majority makes little attempt to explain *why* this is so, beyond claiming that certain factors that assertedly support independent-contractor status—control of the "principal instrumentality" (i.e., the drivers' vans), the drivers' "nearly complete control . . . over their daily work schedules and working conditions," and the "method of payment—all provide the drivers with "significant entrepreneurial opportunity."

As already shown with reference to Board precedent and the *Restatement*, the majority's analysis of the "control" factor is badly mistaken, largely ignoring the Unit Franchise Agreement and the extensive power it gives SuperShuttle over the drivers. Just as mistaken, for the same reasons, is the majority's unjustified attempt to minimize the importance of the factors that everyone acknowledges support finding employee status. Invoking "entrepreneurial opportunity" does not cure the fundamental flaws in the majority's reasoning, not only because this move has no good basis in traditional common law principles, but also because the drivers' supposed "entrepreneurial opportunity" here is minimal at best. As already demonstrated, it is SuperShuttle that creates, controls, and constrains that "opportunity."

SuperShuttle drivers "bid" on trips, but unlike in conventional bidding (in which contractors contend for work), drivers here lack the ability to compete on price, quality of service, or any other distinguishing variable. Instead, drivers compete primarily to be the first to register interest in a job via the mandated Nextel device—hardly the type of competition that favors entrepreneurial skill. Moreover, drivers' job selections are guided largely by geographic proximity—what one driver characterized as "commonsense stuff"—rather than any business strategy. In every instance of bidding, drivers are providing what amounts to the same service for fixed fares. Such a compensation arrangement "leaves little room for the drivers to increase their income through their own efforts or ingenuity."[76] Indeed, it cannot be said that a driver "takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder."[77] Notably, SuperShuttle is seemingly free to enter into non-negotiable franchise agreements with as many drivers as it wishes, allowing it to control the number of drivers "competing" for jobs, while continuing to fix fares that drivers may charge and the weekly payments they must make to SuperShuttle.

Unlike independent businesspeople who operate in the marketplace, SuperShuttle drivers are expressly prohibited from working for competing transportation companies.[78] The fact that vehicles are tailored specifically for use as part of the SuperShuttle system significantly limits their suitability for other business ventures in any case. And, as a practical matter, drivers' considerable financial commitment to working for SuperShuttle—including their vehicle investment and their weekly system fees and insurance payments—all but requires them to work exclusively for the company simply to recoup expenses. Drivers do not set fares, offer discounts, solicit customers, or generate business in any way; nor do they "advertise for business or maintain any type of business opera-

[72] *Restatement (Second) of Agency* §220, comment d.

[73] Id., §220(2)(c) (emphasis added).

[74] Id., §220, comment i.

[75] See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001). Early in its opinion, citing *BKN*, the majority does recite that "[t]he party asserting independent-contractor status bears the burden of proof on that issue"

[76] *Slay Transportation*, supra, 331 NLRB at 1294.

[77] *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).

[78] See *Stamford Taxi, Inc.*, supra, 332 NLRB at 1373.

tion or business presence."[79] All these features of SuperShuttle's relationship with its drivers "severely restrict the drivers' entrepreneurial opportunities to engage in . . . business independent of the [employer]"[80] and "weigh heavily in favor of employee status."[81]

The SuperShuttle drivers, in crucial respects, resemble the insurance agents found to be employees by the Supreme Court in *United Insurance*: (1) the drivers "do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations;" (2) they "need not have any prior training or experience, but are trained by company supervisory personnel;" (3) they "do business in the company's name and with considerable assistance from the company and its managerial personnel;" (4) the agreement "that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company;" and (5) they have what amounts to "a permanent working relationship with the company and which they may continue as long as their performance is satisfactory."[82] In short, applying traditional common-law principles, and even taking "entrepreneurial opportunity" into account—in a way that recognizes the "reality of the actual working relationship"[83]—the Board should find that SuperShuttle has failed to carry its burden of proof to establish that the drivers are independent contractors.

IV.

Nearly 75 years ago, the *Hearst* Supreme Court recognized the difficulties inherent in applying common-law agency principles to employee-status questions under the National Labor Relations Act—and accordingly concluded that Congress could not have intended the common law to control.[84] But Congress responded by making clear that this was precisely what it intended. As the Court then observed in *United Insurance*, it is not for the Board, or even the federal appellate courts, to somehow mitigate the consequences of Congress' choice by deploying magic phrases or shorthand formulas to simplify or rationalize the unwieldy common-law test. The majority's approach here might easily be called the "economic *un*realities" test—impermissibly departing from the common law (just like the "economic realities" test endorsed in *Hearst* and overruled by Congress), but in no way based on a real-world appraisal of working relationships.

If workers are independent contractors under the common law, then they cannot be employees under the National Labor Relations Act. But if, as here, workers are employees under the common law, then they must be treated as such for labor-law purposes. Calling the SuperShuttle drivers "entrepreneurs" or "small business owners" does not make them any less employees entitled to the protection of the National Labor Relations Act. The drivers sought that protection presumably because they understood, all too well, how limited their "entrepreneurial opportunity" really is. An agency charged with "encouraging the practice and procedure of collective bargaining" (in the words of the statute) should act accordingly, so that, if the drivers choose, the non-negotiable Unit Franchise Agreement might be replaced by a collective-bargaining agreement.

Dated, Washington, D.C. January 25, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[79] See *Metro Cab Co.*, 341 NLRB at 724; *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002).

[80] *Stamford Taxi*, supra, 332 NLRB at 1373.

[81] Id.; see also *Prime Time Shuttle*, supra, 314 NLRB at 840.

[82] 390 U.S. at 259. In two respects, the SuperShuttle drivers differ from the insurance agents: they do not account to SuperShuttle for the fares they collect, and they do not participate in the company's benefit plans. But, for reasons explained, those distinctions do not outweigh the overwhelming similarities here.

[83] Id.

[84] The *Hearst* Court observed that the "assumed simplicity and uniformity, resulting from application of 'common-law standards,' does not exist." 322 U.S. at 122. "Few problems in the law have given greater variety of application and conflict in results than the cases arising at the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." Id. at 121 (footnote omitted).

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Subject: DLL Committee Midwinter Meeting - FEBRUARY 24-27
Date: Tuesday, February 19, 2019 12:16:24 PM
Attachments: Roster.pdf
Agenda - FINAL.pdf

Dear Meeting Registrant:

Please find attached the Agenda and Roster for the 2019 DLL Committee Midwinter Meeting, which is being held at the Fairmont Miramar in Santa Monica, California, beginning Sunday, February 24.

The papers and other materials for the meeting are posted on the meeting website at www.ambar.org/DLLpapers. Additional materials will be posted as received.

I look forward to seeing you in Santa Monica.

Safe travels!

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ABA Section of Labor and Employment Law
Committee on Development of the Law Under the NLRA
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**First-Time Attendee*

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Affiliation: Employer
Guest(s): (b) (6)

**First-Time Attendee*

ABA COMMITTEE ON DEVELOPMENT OF THE LAW
UNDER THE NATIONAL LABOR RELATIONS ACT
2019 MIDWINTER MEETING
SANTA MONICA, CALIFORNIA
FEBRUARY 24-27, 2019

PROGRAM AGENDA

GET YOUR LABOR LAW KICKS ON ROUTE 66!

SUNDAY, FEBRUARY 24

3:00 p.m. – 5:00 p.m. **Registration (*Starlight Foyer*)**

3:30 p.m. – 5:00 p.m. ***I Need a Lawyer!* The Ethical Considerations of the Representation of Individual and Corporate Witnesses Before the Board (*Starlight Ballroom*)**

Management: **Amy Moor Gaylord**
Franczek Radelet P.C.

Union: **Angie Cowan Hamada**
Allison, Slutsky & Kennedy P.C.

6:00 p.m. – 6:30 p.m. **First-time Attendee Reception (*Front Drive*)**

6:30 p.m. – 8:00 p.m. **Welcome Reception (*Front Drive*)**

MONDAY, FEBRUARY 25

7:00 a.m. – 8:00 a.m. **Breakfast Buffet (*Deck*)**

8:00 a.m. – 8:30 a.m. **Welcome, Committee Announcements and Introductions (*Starlight Ballroom*)**

8:30 a.m. – 9:45 a.m. ***Which Law Do I Follow?!* E-Verify, The Duty to Bargain and The Intersection of an Employer's Immigration Law Compliance Obligations and the NLRA**

Management: **Joshua D. Nadreau**
Fisher Phillips

Union: **Monica Guizar**
Weinberg, Roger & Rosenfeld P.C.

9:00 a.m. – 10:30 a.m. ***Spouse/Guest Breakfast* (*Jones Library*)**

9:45 a.m. – 10:00 a.m. **Break (*Starlight Ballroom Foyer*)**

10:00 a.m. – 11:15 a.m. ***Magic Words, The Duty to Bargain, and 10(b):*** **The Board's Re-Evaluation of 9(a) Bargaining Relationships in the Construction Industry, Whether the Parties Have to Bargain in Good Faith When Bargaining an 8(f) Agreement, and When is the 10(b) Limitations Period not the 10(b) Limitations Period**

Management: **Philip A. Miscimarra**
Morgan, Lewis & Bockius LLP

Union: **Richard F. Griffin, Jr.**
Bredhoff & Kaiser PLLC

11:15 a.m. – 12:30 p.m. ***Rules, Rules & More Rules:*** **Memorandum GC 18-04 and Employer Work Rules in the Post-*Boeing Company* World**

Management: **Carita Austin**
Faegre Baker Daniels LLP

Union: **Melinda Hensel**
International Union of Operating Engineers, Local 150

Moderator: **Nicole Mormilo**
National Labor Relations Board

6:00 p.m. – 7:00 p.m. **Speakers and Editors Reception (*invitation only*)**

<u>TUESDAY, FEBRUARY 26</u>

7:00 a.m. – 8:00 a.m. **Breakfast Buffet (*Deck*)**

7:00 a.m. – 8:00 a.m. **Women's Breakfast (*Jones Library*)**

8:00 a.m. – 9:15 a.m. ***Anarchy, Business as Usual, Something in Between? Lucia v. SEC*** **and the Constitutional Challenge to the NLRB's ALJs (*Starlight Ballroom*)**

Management: **Jay M. Dade**
Polsinelli PC

Union: **Benjamin O'Donnell**
Gilbert & Sackman

Moderator: **Genaira Tyce**
National Labor Relations Board

9:15 a.m. – 10:15 a.m. **Enforcement Litigation Review**

Speakers: **Meredith Jason**
Ruth Burdick
National Labor Relations Board
Washington, DC

10:00 a.m. – 10:15 a.m. **Break (*Starlight Foyer*)**

10:15 a.m. – 11:15 a.m. **"C" Case Review**

Speaker: **Jayme Sophir**
Associate General Counsel – Division of Advice
National Labor Relations Board
Washington, DC

11:15 a.m. – 12:30 p.m. ***Whose Burden is it Anyway? East End Bus Lines* and the Nexus Element under *Wright Line***

Management: **Harry I. Johnson III**
Morgan, Lewis & Bockius LLP

Union: **Kate M. Swearengen**
Cohen, Weiss & Simon LLP

12:30 p.m. – 12:45 p.m. **Committee and Section Business**

4:30 p.m. – 6:30 p.m. **Pro Bono Project with The People Concern at *SAMOSHEL***

WEDNESDAY, FEBRUARY 27

7:00 a.m. – 8:00 a.m. **Breakfast Buffet (*Deck*)**

7:00 a.m. – 8:00 a.m. **Diversity and Inclusion Breakfast (*Wilshire 1*)**

8:00 a.m. – 9:15 a.m. ***Reading the Tea Leaves*: The Implications of *Janus v. AFSCME* in the Private Sector (*Starlight Ballroom*)**

Management: **Kyllan Kershaw**
Seyfarth Shaw LLP

Union: **Leon Dayan**
Bredhoff & Kaiser PLLC

9:15 a.m. – 10:30 a.m. **Update from the Office of General Counsel:**
2018 Enforcement Developments and 2019 Planned Initiatives

Speaker: **Hon. Peter B. Robb, General Counsel**

10:30 a.m. – 10:45 a.m. **Break (*Starlight Ballroom Foyer*)**

10:45 a.m. – 11:45 a.m. **"R" Case Review: Discussion of Recent Issues Arising in Bargaining Unit Elections under Section 9 of the Act**

Speaker: **Terence Schoone-Jongen**
National Labor Relations Board
Washington, DC

11:45 a.m. – 1:00 p.m. **A Conversation with the National Labor Relations Board**

Speakers: **Hon. John F. Ring, Chairman**
Hon. Lauren McFerran, Member
Hon. William J. Emanuel, Member
Hon. Marvin E. Kaplan, Member
National Labor Relations Board
Washington, DC

7:00 p.m. – 10:00 p.m. **Farewell Reception and Dinner (*Wedgewood Ballroom*)**

Meeting papers and presentations are posted online at:
www.ambar.org/DLLpapers

We thank the following law firms for their generous support of the 2019 DLL Committee Midwinter Meeting:

PLATINUM LEVEL
Epstein Becker Green

GOLD LEVEL
Cozen O'Connor
Barnes & Thornberg LLP
Barran Liebman LLP
Faegre Baker Daniels
Fisher & Phillips LLP
Greenberg Traurig, LLP
Polsinelli
Rosen Marsili Rapp LLP

SILVER LEVEL
Akerman LLP
Blitman & King LLP
Cohen, Weiss and Simon LLP
Constangy, Brooks, Smith & Prophete
Cuda Perez Law
Davis Wright Tremaine LLP
Hogan Marren Babbo & Rose, LTD
Littler Mendelson P.C.
Neal, Gerber & Eisenberg LLP
Seyfarth Shaw LLP
Steptoe & Johnson LLP

From: (b) (6)
To: Ring, John
Cc: (b) (6)
Subject: Invite to speak at ABC conf in DC on 6/27
Date: Wednesday, February 20, 2019 6:00:47 PM
Attachments: 2019 ABC Legal Conference_NLRB_Ring.pdf

John

Please see attached invitation from Associated Builders and Contractors to speak at their Legislative Conference here in DC on June 27. We would be honored if you could do so. Let me or (b) (6), who is cc'd, know.

Thank you.

(b) (6)
Ulman Public Policy & Federal Relations
(b) (6)
www.ulmanpolicy.com

Associated Builders and Contractors, Inc.

VIA EMAIL

February 20, 2019

Hon. John F. Ring, Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Re: Invitation to ABC Legal Conference
June 27, 2019 – Hyatt Regency Washington on Capitol Hill, Washington, D.C.

Dear Chairman Ring:

On behalf of Associated Builders and Contractors, Inc., a national construction trade association representing more than 21,000 members, I would like to extend an invitation to you to speak at the 2019 ABC Legal Conference, to be held at the Hyatt Regency Washington on Capitol Hill in Washington, D.C., on the morning of Thursday, June 27.

ABC Legal Conference attendees consist primarily of attorneys from all over the country who focus on representing construction industry employers on labor and employment issues. The attorneys are familiar with the NLRB and its holdings and will be interested in hearing your views on recent NLRB decisions and policies impacting the construction industry, as well as the overall direction of the board in the coming year. Many NLRB members, including some of your immediate predecessors, have addressed the ABC Legal Conference in recent years, and we are pleased to continue the tradition with your invitation.

Should you have any questions or need additional information, please contact (b) (6) at (b) (6) @abc.org.

I look forward to hearing from you.

Sincerely,

(b) (6)

(b) (6)

(b) (6) Regulatory, Labor and State Affairs

From: Kanu, Hassan
To: McFerran, Lauren; Ring, John
Subject: RE: re: D.C. Circuit ruling on election rule application
Date: Friday, April 19, 2019 1:48:40 PM

Appreciated—thank you, Member McFerran. Enjoy your weekend!

From: McFerran, Lauren [mailto:Lauren.McFerran@nlrb.gov]
Sent: Friday, April 19, 2019 1:47 PM
To: Kanu, Hassan <hkanu@bloomberglaw.com>; Ring, John <John.Ring@nlrb.gov>
Subject: Re: re: D.C. Circuit ruling on election rule application

Hassan,

I'm going to decline to comment but thanks for checking in.

Lauren

Get Outlook for iOS

From: Kanu, Hassan <hkanu@bloomberglaw.com>
Sent: Friday, April 19, 2019 12:51:46 PM
To: Ring, John; McFerran, Lauren
Subject: FW: re: D.C. Circuit ruling on election rule application

Hi Chairman Ring and Member McFerran,

Hope you're doing well. I wanted to forward along this inquiry, given the away messages from Tracey and Cynthia, to be sure you both, and the agency, actually have/has a chance to make a decision on commenting. Please do feel free to give me a call or forward to any of the other members, if you feel that's necessary or appropriate.

Thanks!

From: Kanu, Hassan
Sent: Friday, April 19, 2019 12:49 PM
To: Tracey Roberts (tracey.roberts@nlrb.gov) <tracey.roberts@nlrb.gov>
Subject: FW: re: D.C. Circuit ruling on election rule application

Hey hey Tracey—long time no talk, hope you've been good. Just forwarding this along—thanks!

From: Kanu, Hassan
Sent: Friday, April 19, 2019 12:47 PM
To: Witkin, Cynthia <Cynthia.Witkin@nlrb.gov>; SM-Publicinfo <Publicinfo@nlrb.gov>
Subject: re: D.C. Circuit ruling on election rule application

Hi Cynthia,

Hope you've been well. The D.C. Circuit ratified the Obama NLRB's election rule changes this morning: https://www.cadc.uscourts.gov/internet/opinions.nsf/2B20692727C8717D852583E1004D3730/$file/18-1161.pdf and I'm currently working on an article.

I believe that makes the second court of appeals to have OK'd the rules (5th and D.C.). The ruling—which is short and dismissed all of UPS' claims—and the fact that the board's data shows unions aren't winning elections at any significantly larger rate would seem to support some of the arguments the unions and Dems have been making against the board's request for comment on changing the rules/plan to do so.

In addition, the board's RFI noted that circuit court rulings at the time "did not preclude the possibility that the Election Rule might be invalid as applied in particular cases." The court has now ratified the

application of the rules to UPS' particular circumstances, which indicates that sort of application, at least, is valid.

Please let me know if the Chairman or any of the other concurring members on the request for information has any general comment, or comment on the couple points I've raised. And if Member McFerran also has any comment on the matter, given her dissent.

Thanks!

: : : : : : : : : : : : : : : : : :

Hassan Kanu
Legal Editor/Reporter
Bloomberg Law
Desk 703.341.3953
Cell 240.643.7506
Twitter: @hassankanu

From:	Bashford, Jo Ann
To:	(b) (6)
Cc:	(b) (6) ; Ring, John
Subject:	PowerPoint -- Report from the NLRB
Date:	Tuesday, May 7, 2019 8:54:17 AM
Attachments:	RING Slide Pres re NLRB - May 2019.pptx

(b) (6) As promised, attached is the Chairman's presentation for Thursday in Chicago. Please let me know if you have any issues accessing the document.

With kind regards,

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

Report from the NLRB

John F. Ring
Chairman
National Labor Relations Board

May 2019

Current Composition

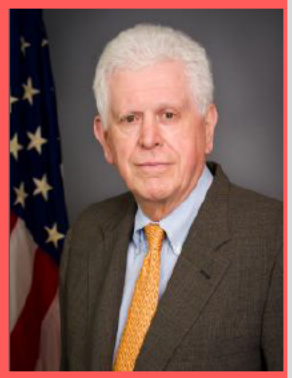
Republicans

John F. Ring

(end of term 12/16/2022)

Marvin E. Kaplan

(end of term 08/27/2020)



William J. Emanuel

(end of term 08/27/2021)

Democrats

Lauren McFerran

(end of term 12/16/2019)

?

Republican

Peter B. Robb

(end of term 12/16/2021)

Board Members

General Counsel

On December 17, 2019

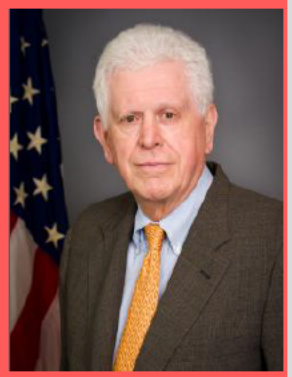
Republicans

John F. Ring

(end of term 12/16/2022)

Marvin E. Kaplan

(end of term 08/27/2020)



William J. Emanuel

(end of term 08/27/2021)

Democrats

?

?

Republican

Peter B. Robb

(end of term 12/16/2021)

Board Members

General Counsel

RULEMAKING

- **Joint Employer Standard**
  - NPRM Sept 14, 2018
  - Comment period closed Feb 11, 2019
- **Election Protection**
  - Blocking Charges
  - Voluntary Recognition
  - 8(f)/9(a) Conversions
- **2014 Election Rules**
  - RFI Dec. 2017
- **Other**


BACK
TO THE FUTURE

Super Shuttle DFW, Inc. - Independent Contractor
367 NLRB No 75 (January 25, 2019)

United Nurses (Kent Hospital) - Beck Chargeable Fees
367 NLRB No. 94 (March 1, 2019)

Ridgewood Health Care Center - Successorship
367 NLRB No. 110 (April 2, 2019)

Alstate Maintenance, LLC - PCA
367 NLRB No. 68 (January 11, 2019)

The Boeing Co. - Rules, Handbooks, Policies
365 NLRB No. 154 (December 14, 2017)

- Employer Use of **Employer Email Systems** for union organizing and other protected concerted activity (***Purple Communications***) **–** *Rio All-Suites Hotel and Casino*

- **Charter Schools** Jurisdiction

- **Employment policies, rules and handbooks**
- **Workplace Investigation Confidentiality**

  (*Banner Estrella*)
- **Employee Witness Statements**

  (Piedmont Gardens)
- **Definition of Supervisor**

  (Buchanan Marine, G4S Government Solutions and many more)
- **Discipline Bargaining**

  (Total Security Management, Alan Ritchey)
- **Permanent Replacements (“indep unlawful purpose”)**

  (Piedmont Gardens)
- **Other Successorship Issues**

Report from the NLRB

A Board Member's Perspective

John F. Ring
Chairman
National Labor Relations Board

May, 2019

From: (b) (6)
To: Ring, John
Subject: Thank You
Date: Friday, May 17, 2019 5:11:40 PM
Attachments: image003.png
image005.png

Chairman Ring,

Just a quick note on behalf of the AGC Labor and Employment Law Council to say thank you again for taking time out of your busy schedule to speak at the Council's Annual Construction Labor Law Symposium last week. Your presentation provided the audience with valuable information and insight about the Board's operations, cases, and rulemaking. Program evaluations from attendees support my own opinion that your participation was a key component in the program's success.

Please do not hesitate to reach out if I, or AGC, can ever be of assistance.

Have a great weekend!

Best,
(b) (6)

(b) (6)
(b) (6)
The Associated General Contractors of America
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Arlington, VA 22201
Phone: (b) (6)
Email (b) @agc.org
www.agc.org

From: (b) (6) on behalf of (b) (6)
To: Ring, John
Cc: (b) (6)
Subject: OSBA Presentation Outline
Date: Wednesday, November 27, 2019 2:42:32 PM
Attachments: FINAL NLRB Update 11.8.19.docx

John,

Thank you again for stepping in for Bill. The Bar Association is most appreciative of your last minute decision to help make our conference a success. Attached is the outline that I sent to Bill that we were planning on utilizing as I "interviewed" Bill regarding developments at the Board. Please call me if you have any questions. John, again thank you for your willingness to step in.

Thanks,

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HR Policy Association
NEW ADDRESS
1001 19th Street North, Suite 1002| Arlington, VA 22209
Direct: (b) (6) | Cell: (b) (6) | (b) @hrpolicy.org
Assistant: (b) (6) | (b) (6) @hrpolicy.org

NLRB UPDATE

NLRB activity, through both adjudication and rulemaking, has picked up considerably over the last few months. Outlined below is an update of significant Board decisions and rulemaking initiatives during this time period.

BOARD DECISIONS

- *The Boeing Company*, 368 NRLB No. 67 (Sept. 9, 2019) – **Bargaining Units**
    - The Board applied and clarified the traditional community-of-interest standard for determining bargaining units, ruling that a petitioned-for-unit at Boeing's South Carolina plant that was limited to only two job classifications within a production line was not an appropriate unit.

- *Velox Express, Inc.* – 368 NLRB No. 61 (Aug. 29, 2019) – **Misclassification**
    - The Board held that employers do not violate the National Labor Relations Act ("NLRA" and "Act") solely by misclassifying employees as independent contractors. While this decision generated significant media attention due to the emerging gig economy context, it is important to note that this decision merely reaffirmed long standing precedent that misclassification **alone** does not constitute an unfair labor practice. Employers, however, who intentionally misclassify employees, however, to avoid coverage of the NLRA will, in all likelihood, be found to have violated the Act, and may also have problems under other labor statutes such as the Fair Labor Standards Act for failing to pay overtime at the proper rate.

- *M.V. Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019) – **Employer Unilateral Changes to Contract**
    - The Board adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the NLRA. The Board abandoned its existing "clear and unmistakable waiver" standard, under which virtually any employer's unilateral change violates the NLRA unless a contractual provision unequivocally and specifically referred to the type of employer action at issue. Under the new "contract coverage" standard, the Board will examine the plain language of the CBA to determine whether the change made by the employer was within the or scope of contractual language granting the employer the right to act unilaterally. This decision is especially important for employers that may need to make modifications in their benefit plans during the term of a collective bargaining agreement.

- *UPMC*, 368 NLRB No. 2 (Jun. 14, 2019) & *Kroger LP*, 368 NLRB No. 64 (Sept. 6, 2019) – **Access to Employer Private Property**
    - In a pair of cases, the Board significantly restricted union access to private employer property, supplying employers with powerful tools to combat prohibited solicitation and related activities on their premises. For example, under a 37-year-old precedent, employers were required to allow nonemployee union reps access to public areas of their property, such as dining areas or cafeterias, for solicitation and distribution purposes.
        - In *UPMC*, the Board held that employers **do not** have to allow nonemployees access to such areas for such purposes, provided they enforce their no solicitation/no distribution policies in a consistent and nondiscriminatory manner.
        - In *Kroger*, the Board held that an employer could lawfully eject nonemployee union reps soliciting petition signatures from a shared shopping center parking area.
        - *UPMC* and *Kroger* - This pair of cases represents a significant expansion in employer rights to eject nonemployee union personnel from their private property. These holdings create a new Board standard in which an employer can bar non-employees from their property so long as the employer policy is nondiscriminatory for activities that "*are similar in nature*." Thus, an employer could bar nonemployees from their property if they are engaging in picketing or boycotts, even if the same policy allowed for charitable groups to solicit, since the two activities are not similar in nature.

- *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (Aug. 14, 2019) – **Arbitration Agreements**
    - This was the first Board decision to address the mandatory arbitration agreements since the Supreme Court's 2018 ruling in *Epic Systems v. Lewis*, which held that class and collective action waivers in mandatory arbitration agreements do not violate the NRLA. In *Cordua*, the Board held that:
        - Employers are not prohibited under the National Labor Relations Act (NLRA) from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
        - Employers, however, are not prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.
        - Employers are prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

- *Wendy's Restaurant*, 368 NLRB No. 72 (Sept. 11, 2019) – **Arbitration Agreements**

- In a supplemental decision, the Board held that the arbitration agreements a Wendy's franchisee makes employees sign are valid because the agreements have a "savings clause" notifying workers that the agreements do not prevent them from filing a complaint or charge with an administrative agency such as the NLRB. The decision provides clarity for employers on how to properly draft arbitration agreements so as to make clear that despite mandatory arbitration, employees still have recourse through administrative agencies such as the NLRB.

- *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2019) – **Offensive Language in the Workplace**
  - In this ongoing case, the Board recently invited briefs on whether the Board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature in the workplace. The current standard as applied has resulted in multiple decisions in which extreme language was held to be protected by Section 7 of the NLRA. While this case is months away from being resolved, it is notable that the Board is considering loosening employee speech protections and allowing employers to have more latitude in ensuring decorum in the workplace. The ultimate holding in this case may also better align requirements of Title VII and the NLRA in situations where racially offensive language is used in the workplace and in strike situations.
- *Caesars Entertainment Corp.*, 2018 WL 3703476 (Aug. 1, 2018) – **Use of Employer Email**
  - In this ongoing case, the Board invited briefs in August of 2018 on whether the Board should overturn the legal standard articulated in *Purple Comms.*, 361 NLRB 1050 (2014), in which the Board allowed employee use of employer email for union business, prohibiting employers from imposing limitations on use of its email systems.
- *Walmart Stores*, 368 NLRB No. 24 (Jul. 25, 2019) – **Intermittent Strikes**
  - In this decision, the Board held that the employees had participated in an unprotected intermittent strike because a stipulation admitted that the stoppage, the third in a series of strikes, was pursuant to a strategy to strike, return to work, and strike again in support of the same goals. The group of employees went on several strikes lasting one to six days over a three year period, culminating in 54 employees being disciplined or discharged for violating Walmart's attendance policy. The Board reversed the ALJ – who had found the striking activity to not be intermittent and thus protected activity – and held that the ultimate inquiry in determining whether or not a strike is "intermittent" is "whether the work stoppage arose pursuant to a strategy to use a series of strikes in support of the same goal." The decision provides more clarity to employers on how the Board will evaluate whether striking activity is "intermittent" and thus unprotected by the NLRA.

DIVISION OF ADVICE

- The Board's Division of Advice recently released three guidance memos – related to cases in 2013, 2015, and 2018 – concerning social media policy, arbitration, and financial information disclosure during collective bargaining.
    - The first memo concluded that a rehab center and nursing home's social media policy for its employees was illegal, because it blocked workers from posting any information or rumors about the employer that were either false or inaccurate, which could chill employees' willingness to freely discuss concerns about their terms and conditions of employment.
    - The second memo concluded that a car dealership illegally tried to limit workers' ability to collectively pursue claims in arbitration that they weren't properly paid overtime.
    - The third memo concluded that an NBC affiliate illegally refused to provide its union with financial information about the company during collective bargaining talks.
- In November of 2019, Associate General Counsel for the Division of Operations-Management Beth Tursell issued a guidance letter to NLRB regional offices laying out a procedure by which charges alleging employers of violating the NLRA by unilaterally changing the job conditions of its employees could be resolved through arbitration. The letter is related to the Board's decision in *MV Transportation*, in which the Board eased the standard for whether an employer violates the Act by making such unilateral changes. According to Tursell's letter, when workers file charges with the NLRB alleging their employers violated the NLRA by unilaterally changing job conditions (i.e. without the union's consent), officials should defer to arbitration if one of the parties requests it under the *Dubo* doctrine which prescribes deferral when there is a "reasonable chance the grievance machinery will resolve the dispute or put it at rest. But even where the union has not requested arbitration, "regions should consider whether deferral would nevertheless be appropriate under the Board's *Collyer* deferral doctrine," under which unions can be made to arbitrate disputes that are covered by an arbitration process that culminates in binding resolution. Only where both the employer and the union oppose arbitration, according to the letter, should the Board pursue the charge through the normal complaint process. This guidance letter likely increases the likelihood that charges of unilateral changes will be resolved through arbitration.

RULEMAKING

A. **NPRMs**

- Union Election Procedures (Aug. 12, 2019)
    - The Board published a Notice of Proposed Rulemaking on August 12, 2019, proposing three amendments to its current election rules and regulations in the interest of expanded employee free choice.
        - **Blocking Charge Policy**: elections would no longer be blocked by pending unfair labor practice charges, but ballots would be impounded until charges are resolved. The current blocking charge procedure has

often resulted in decertification petitions being blocked from an election for a substantial period of time.

- **Voluntary Recognition Bar**: for voluntary recognition under Section 9(a) to bar a subsequent representation election – and for a post-recognition CBA to have contract-bar effect – unit employees must receive notice that voluntary recognition has been granted and a 45-day period must be provided to employees to permit them to file an election petition to challenge the voluntary recognition.
- **Section 9(a) Recognition in the Construction Industry**: in the construction industry, proof of a Section 9(a) relationship will require positive evidence of majority employee support and cannot be based on contract language alone.

- Joint Employer (Sept. 13, 2018; commenting period closed Feb. 11, 2019)
  - The Board published a Notice of Proposed Rulemaking regarding the standard for determining joint employer status. The public comment period closed in February 2019. The proposed rule requires that before an entity can be found to be a joint employer under the NLRA, evidence must establish that such entity had actual, direct and immediate control over the essential terms and conditions of employment of the employees in question. A final rule on this controversial topic will likely arrive before the end of the year.
- Jurisdiction – Nonemployee Status of University and College Students Working in Connection with Their Studies (Sept. 23, 2019)
  - The Board published a Notice of Proposed Rulemaking on September 23, 2019, proposing a regulation establishing that students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not "employees" under the NLRA.

B. **On the Rulemaking Agenda** (May 22, 2019)

- Representation Case Procedures
  - The Board, in its rulemaking agenda published in May, indicated that it would make substantial changes to the union-friendly election rules promulgated by the Obama-era Board in 2014. The 2014 changes assist unions in their organizing campaigns by establishing an accelerated time period for an election after a petition has been filed, and by requiring voter eligibility issues to be resolved.

- Access to Employer's Private Property
  - The Board's published rulemaking agenda also indicated an intent to initiate rulemaking regarding the standards for access to an employer's private property. A proposed rule would likely mirror the recent Board decisions in *UPMC* and *Kroger* and significantly limit nonemployee access to employer private property. The Board may also seek to clarify the rights of off-duty

employees to come onto their employer’s property, and when such access can be denied or restricted.